111-400

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 234.

CLAIBORNE COUNTY, PLAINTIFF IN ERROR,

vs.

WALTER B. BROOKS, ASSIGNEE OF HOWARD COLE, & COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

FILED APRIL 1, 1881.

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1 Be it remembered that at a circuit court of the United States, began and held for the eastern district of Tennessee, at the federal court room, in Knoxville, within the sixth circuit, and in said district, upon the second Monday, it being the 10th day of January, 1876, the following proceedings were had, to wit:

There being no judge of said court present, the court was regularly opened by Samuel P. Evans, United States marshal for the eastern district of Tennessee.

WALTER B. BROOKS, Assignee, &c.,
vs.
CLAIBORNE COUNTY. } Debt No. 594.

Came the plaintiff, by his attorney, James G. Rose, into open court, and filed a certified transcript of the record and proceedings in this cause, removed from the circuit court of Claiborne county, Tennessee.

Transcript from the Circuit Court of Claiborne County.

Caption of the Court.

The State of Tennessee, Second Judicial Circuit.

Be it remembered that at a circuit court began and held for Claiborne county, at the court house, in Tazewell, on the 1st Monday of September, A. D. 1871, the same being the 4th day of said
2 month. Present and presiding: The Honorable James H. Randall, judge of the second judicial circuit in the State of Tennessee, when the following proceedings were had, to wit:

Prosecution Bond.

W. B. BROOKS *vs.* CLAIBORNE COUNTY.

Know all men by these presents that we, W. B. Brooks, as principal, and R. M. Barton, Wm. McFarland, and James P. Evans, partners under the firm name and style of Barton, McFarland & Evans, as his securities, are held and firmly bound unto Claiborne county in the penal sum of two hundred and fifty dollars, to the payment of which we bind ourselves firmly by these presents, but to be void on condition that the said Brooks, as assignee in bankruptcy of Howard, Cole & Co., doth with effect prosecute an action of debt this day by him about to be commenced against said Claiborne county in the circuit court of said county. Otherwise to pay and satisfy all costs that may be awarded for failure by said court. This 21st February, 1871.

W. B. BROOKS, *by his Attorney,*
JAMES P. EVANS.
BARTON, McFARLAND & EVANS.

Summons.

3 The State of Tennessee to the sheriff of Claiborne county, Greeting:

You are hereby commanded to summon Claiborne county to ap-

pear before the judge of our circuit court, to be held for the county of Claiborne, at the court house in Tazewell, on the first Monday of May next, to answer W. B. Brooks, as the assignee in bankruptcy of George W. Howard, John H. Cole, and H. F. Scherman, former partner in trade, and trading under the firm name and style of Howard, Cole & Co., of a plea that said Claiborne county render unto him the sum of five hundred dollars, which to him, as such assignee, said county justly owes, and from him unjustly detains, to his damage, three thousand dollars. Herein fail not, and have you then and there this summons.

Witness J. M. Treece, clerk of said court, at office in Tazewell, the 1st Monday of January, 1871.

J. M. TREECE, *Clerk.*

Issued Feb'y 28th, 1871.

J. M. TREECE, *Clerk.*

Endorsement: Came to hand 6th day of March, 1871. J. Y. Chadwick, sheriff.

Executed this summons by summoning Joseph Ausmus, as the present chairman of the county court of Claiborne county, to appear and answer as herein directed. Executed this 6th day of March, 1871.

J. Y. CHADWICK, *Sheriff.*

4 Circuit Court. May Term, 1871. Filed on the 2d day of ——, 1871. J. M. Treece, c'k.

Original Declaration.

W. B. BROOKS, Assignee in bankruptcy of Howard, Cole & Co.,

vs.

CLAIBORNE COUNTY.

STATE OF TENNESSEE, *Claiborne County:*

W. B. Brooks, the assignee of the estate of George W. Howard, John H. Cole, and H. F. Schereman, former partners in trade, and trading under the firm name and style of Howard, Cole & Co., bankrupts, according to the act of the Congress of the United States in force concerning bankrupts, by attorney, complains of Claiborne county, which is in court by summons, of a plea that the said Claiborne county render unto the plaintiff the sum of $5,000, which to him said Claiborne county owes, and from him unjustly detains to his damage, as assignee aforesaid, $5,000.

For this that heretofore, to wit, on the 7th day of April, 1868, at and to wit, in said county, the defendants, the said county of Claiborne, by order of the justices of said county, a majority thereof being present and voting therefor, made, executed, and deliv-
5 ered to one V. H. Sturm the certain bond or writing obligatory of the said county, signed with the name of Thos. L. Davis, as chairman of the county court of said county, with the seal of said county court, and attested by David Cardwell, as clerk of said court, which said bond or writing obligatory is now here to

the court shown. Wherein and whereby the said defendant acknowledged itself bound to the said V. H. Sturm in the said sum of $5,000, and then and there by said bond or writing obligatory promised to pay, on or before the 1st day of January, 1870, unto the said V. H. Sturm, the said sum of $5,000, with interest thereon from the said 7th day of April, 1868, until paid.

Which said bond or writing obligatory afterwards, to wit, on the — day of ——, 186–, at Baltimore, in the State of Maryland, to wit, in the county aforesaid, before the said George W. Howard, John H. Cole, and Schereman, became bankrupts, was, by the said V. H. Sturm, by his written endorsement thereon of that date, endorsed and tranferred in the usual course of trade to the said firm of Howard, Cole & Co., a firm composed of the partners aforesaid. Yet the plaintiff saith that the said defendant, although often re-
6 quested so to do, hath, not as yet, paid said sum of money above demanded, or any part thereof, to the said firm of Howard, Cole & Co. before they became bankrupts, or to the plaintiff since they became bankrupts, but hath hitherto wholly neglected and refused, and still neglects and refuses, so to do, to the damage of the plaintiff, as assignee aforesaid, of three thousand dollars. Wherefore he sues.

BARTON, McFARLAND & EVANS, and
ROSE & HODGES, *Attorneys for Plaintiff.*

Circuit Court Claiborne County. May Term, 1871.

Pleas.

W. B. BROOKS, Assignee, &c., *vs.* CLAIBORNE COUNTY.

1st. The defendant, by attorney, comes and defends when, &c., and for plea says the said plaintiff his cause of action in his declaration mentioned ought not to have and maintain against her, because she says that said pretended bond in said declaration mentioned, issued without any authority in law. The county court of Claiborne had no authority under the laws of the State of Tennessee to issue said bond or such bonds. And this defendant is ready to verify. Wherefore she prays judgment.

ROGAN & JARVIS & PATTESON,
Attorneys for Def't.

7 2d. And for further plea in this behalf the defendant says that if the county court of Claiborne county had authority by law to issue said bond, which is not admitted, but denied, she never authorized the issuance of said bond, and never conferred upon the chairman, Thos. L. Davis, authority to issue any such bond as the bonds sued on. And this defendant is ready to verify. Wherefore she prays judgment.

ROGAN & JARVIS & PATTERSON,
Attorneys for Def't.

3d. And for further plea in this behalf the said defendant says the plaintiff, his said action against her, ought not to have and

maintain, because, she says, there are twelve civil districts in said county of Claiborne, and, consequently, twenty-five legal and actual magistrates in said county. By law a majority of all the magistrates of the county is required to appropriate public money to an amount over fifty dollars.

The number of magistrates constituting the county court of Claiborne county when the appropriation was made, set out in said pretended bond, and mentioned in the declaration, to wit: The first Monday, the 7th day of April, 1868, was only eleven less than
8 a majority of the justices of said county. Wherefore the de-
defendant says that said appropriation was illegal and void; and this, defendant is ready to verify. Wherefore she prays judgment, &c.

ROGAN & JARVIS,
Att'ys for Def't.

4. And for further plea in this behalf the said defendant says the plaintiff, his said action against her, ought not to have and maintain, because, she says, by law, in making appropriations of money the vote of the justices present shall be taken by ayes and noes, the clerk calling and recording the names of each justice, togther with his vote, aye or no, as it is given, which shall be entered on the minutes, together with the items of allowance.

The defendant avers that when the appropriation was made, as set out in said pretended bond, and in the declaration, to wit, on the 7th day of April, 1868, the clerk did not call the ayes and noes and record the name of each justice, together with his vote, aye or no, as given and entered said votes and names on the minutes of the court, together with the allowance made to said V. H. Sturm, as required by law. Wherefore she says said appropriation
9 was illegal and void; and this, defendant is ready to verify. Wherefore she prays judgment.

ROGAN & JARVIS,
Att'y for Def't.

5. And for further plea in this behalf the said defendant says that the plaintiff, his said action against her, ought not to have and maintain, because she said that said pretended allowance was obtained by V. H. Sturm for the building of the court house in Tazewell. Said Sturm had already been paid more than the contract price for said building, and said allowance was obtained from an incompetent court by improper means, and was not supported by any legal or valid consideration. And this defendant is ready to verify. Wherefore she prays judgment.

ROGAN & JARVIS,
Att'y for Def't.

6. And for further plea in this behalf the defendant says she does not owe the debt in the declaration mentioned, and of this she puts herself upon the country.

ROGAN & JARVIS,
Att'ys for Def't.

And the plaintiff as to the sixth plea of the defendant to the first count in the declaration, wherein defendant puts herself
10 upon the country, doth the like.

Filed May 5, 1871.

ROSE & HODGES, *For Pl'ff.*

J. M. TREECE, *Cl'k.*

Demurrer.

Circuit Court, May Term, 1871.

W. B. BROOKS, Assignee, *vs.* CLAIBORNE COUNTY.

The said plaintiff, by attorney, comes and says that he is not bound to make other and further answer to defendant's pleas Nos. 1, 2, 3, 4, 5, and 6, than by demurrer, and he therefore demurs and assigns for cause of demurrer the following:

1. The said plea not is bad, because it affects to state matter of law and not of fact. The said plea alleges a want of authority in law, and not a want of authority in fact to issue the bond. This a question of pure law, and not matter for plea. Besides the defence therein set up, would be available under the general issue.

2. The said plea, No. 2, is bad because, first, it is argumentative; secondly, it is no answer to plaintiff's action to aver that she did not confer upon Thos. L. Davis authority to issue said bonds, because that averment does not negative the fact that defendant did
11 execute and deliver the bond; thirdly, an issue taken upon that plea would be immaterial; and, fourthly, the defence therein set up would be available only under the plea of *non est factum*, which should be pleaded under the corporate seal of defendant.

3. The said plea, No. 3, is bad, because the matter of the plea is only available under the plea of *non est factum*.

If the bond was executed and delivered by authority of an incompetent county court as alleged, it is simply not the act of the county, and should be so pleaded.

4. The said plea, No. 4, is bad because, first, it does not present a bar to plaintiff's action; secondly, it is argumentative; thirdly, the statute therein referred to is directory and not imperative, and a failure to comply with its provisions would not vitiate the proceedings of the court as to third parties who have an interest in appropriations thus made; and, fourthly, the defence therein set up would be available only under the plea of *non est factum*, if available at all.

5. The said plea, No. 5, is bad because, first, it is repug-
12 nant; second, it is double; third, the plea states that the bond was not supported by any legal or valid consideration, thus impliedly admitting that it was founded on same consideration. The averment should show the facts from which it would judicially appear whether or not the consideration of the bond was illegal.

6. The said plea, No. 6, is bad, because the plea of said debit is

no answer to an action of debt upon a specialty. The plea should be *non est factum* as payment.

Filed May 6, 1875.

ROSE & HODGES, *For Pl'ff.*

J. M. TREECE, *Clerk.*

Amended Declaration.

State of Tennessee, Claiborne County.

W. B. BROOKS, Assignee, &c., *vs.* CLAIBORNE COUNTY.

Walter B. Brooks, assignee in bankruptcy of George W. Howard, John H. Cole, H. F. Schereman, partners in trade under the name of Howard, Cole & Co., by leave of the court first had and obtained, further complains of Claiborne county, which is in court by summons, &c., of a plea that the said defendant rendered unto the said plaintiff the further sum of $5,000, which to him the said defendant owes and unjustly detains to his damage.

13 For this, that heretofore, to wit, on the —— day of April, 1866, at the county aforesaid, the said defendant, by order of the justices of the peace for said county, a majority thereof being present and voting therefor, contracted with one V. H. Sturm for the building and completion of a court-house at Tazewell, the county seat of said county, which, before that time, had been destroyed by fire, according to certain plea and specifications for said building then and there agreed on, and for which it was further agreed that the said defendant should pay the said V. H. Sturm the sum of ten thousand dollars.

And afterwards, to wit, on the —— day of April, 1867, at the county aforesaid, the said defendant, by like order of the justices of the peace of said county, a majority thereof being present and voting for the same, contracted and agreed with the said V. H. Sturm for a change in the said plan and specification and mode of construction of said court-house before the completion of the same, whereby the said Sturm was to make an extension to said original building, by the execution and completion of two wings and

14 a portico and other alterations, for which it was then and there agreed that the said Sturm should receive and be paid the sum of ten thousand dollars for said changes and alterations, and for executing and erecting and building said wings and portico, and for erecting and completing the same.

And the plaintiff avers that the said V. H. Sturm afterwards, to wit, on the —— day of ———, 1875, at the county aforesaid, in consideration of the said promise undertaking any agreement of the defendant, erect, construct, build, and complete said court-house and wings thereto and portico, according to the said plans and specifications, and in conformity to said contract and agreement in reference thereto, of which the said defendant had due notice, and which said court-house, wings, and portico was then and there accepted by the defendant, whereby, and by reason whereof, the said defendant then and there became and was liable to pay the said V. H. Sturm,

and was indebted to him in the said several sums in this count mentioned for the erection, building, and completion of said court-
house, wings, and portico, to be paid by the said defendant
15 to the said V. H. Sturm, and the said defendant should be thereunto afterwards requested; which liability and indebtedness of the said defendant was evidenced by a certain paper writing of the said defendant (now here to the court shown), and which was then and there delivered to the said Sturm, whereby, and by reason of the said several sums of money being and remaining unpaid, an action accrued to the said Sturm to demand and have of and receive from the said defendant the said several sums of money in this count specified.

And the plaintiff further avers that said debt and liability was, by the written endorsement and assignment of the said Sturm, and before the bringing of this suit, and before the bankruptcy of the said firm of Howard, Cole & Co., assigned and transferred to said firm in due course of trade, and which, upon their bankruptcy, was assigned, by operation of law, to the plaintiff, of which the defendant had notice. Yet the said defendant, although often requested so to do, has not yet paid the said several sums above demand[ed], or either or any part thereof, to the said V. H. Sturm, before
16 his said assignment, or to the said firm of Howard, Cole & Co., or to either of the partners thereof, at any time before their bankruptcy, or to the plaintiff since his appointment as assignee in bankruptcy of said firm, but so to do the said defendant hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the plaintiff's damage, $3,000.00; wherefore he sues, &c.

And for this, that also afterwards, to wit, on the —— day of April, 1868, at the county aforesaid, the said defendant, in consideration that the said V. H. Sturm, at the special instance and request of the said defendant, had before that time performed certain work and labor, and caused and procured the same to be done, and had furnished certain brick, mortar, stone, lumber, and other material in and about the building, construction and completion of a court-house and wings and portico thereto, at Tazewell, in said county, according to a named plan and specification.

The said defendant undertook and then and there agreed to pay the said V. H. Sturm the sum of ten thousand dollars when
17 thereunto afterwards requested, whereof the county court of said county, at its April term, 1868, a majority of the justices thereof being present and voting therefor, made an appropriation and order of record to pay the said Sturm the said sum of ten thousand dollars. Whereby and by reason of the said last-named sum of money remaining and being wholly unpaid, an action accrued to the said V. H. Sturm to demand, have from, and receive from the said defendant the said last-named sum of money above demanded, and the plaintiff avers that the said debt and sum of money last above demanded was afterwards, and before the bringing of this suit, and before the bankruptcy of the said firm of Howard, Cole & Co., by the written assignment of the said Sturm, assigned and trans-

ferred to the said firm of Howard, Cole & Co., in due course of trade, and which, upon the bankruptcy of said firm, were, under and by virtue of certain proceedings in bankruptcy, assigned to the plaintiff.

Yet the said defendants, although often requested, have not yet paid the said sum last above demanded to the said V. H. Sturm before his said assignment thereof, or to the said firm of How-
18 ard, Cole & Co., or to either of said partners, before they became bankrupts, or to the plaintiff since he became assignee in bankruptcy of said firm; but so to do the said defendant hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the plaintiff's damage, $5,000. Wherefore he sues.

ROSE & HODGES, *Att'ys for Pl't'ff.*

Filed Oct. 11th, 1871. J. M. Treece, clerk.

Demurrer to the Amended Declaration.

Circuit Court, Claiborne County.

W. B. Brooks, Assignee, *vs.* Claiborne County.

The defendant, by attorney, comes and defends, &c., and for defence says she is not bound to answer the plaintiff's amended declaration in this behalf otherwise than by demurrer, and for cause of demurrer set[s] down the following:

1st. Plaintiff sues, as is alleged in the first count of his declaration, for the breach of a contract, by which it is alleged de-
19 fendant agreed to pay plaintiff's assignee an indefinite or uncertain sum of money. There is no allegation in the declaration that plaintiff ever applied to, and that the county court to make an appropriation to pay plaintiff's claim, and that she refused so to do. There is no allegation that the county court was ever applied to levy a tax to plaintiff's claim, and that she refused so to do.

The second count alleges that defendant agreed to pay plaintiff $5,000 for certain work, material, &c., furnished by plaintiff's assignee to defendant, &c.

There is no allegation in said count that defendant ever, in any lawful way, contracted for such work, material, &c., or in any legal way agreed to receive or pay for the same, or that defendant ever received the same.

There is no allegation that the county court was ever applied to levy a tax or make an appropriation for legal demand of plaintiff against her.

There is nothing alleged to put defendant in defunct.

The jurisdiction of the circuit court in said case is by mandamus. The declaration is in other respects uncertain, vague, and unformed.

ROGAN & JARVIS, *For Def't.*

20 Filed January 4th, 1872. B. McKiney, *D. C.*

Plea of Non Est Factum.

Circuit Court, Claiborne County, May Term, 1872.

W. B. BROOKS, Assignee, &c., *vs.* CLAIBORNE COUNTY.

The defendant for plea says, that the bond upon which the plaintiff's action is founded was not executed by her or by any one authorized to bind her in the premises, and of this defendant puts herself upon the country.

ROGAN & JARVIS, *Att'y for Def't.*

And the defendant, by the chairman of her county court, makes oath that he believes the foregoing plea to be true.

A. M. JENNINGS,
Chairnman of the County Court.

Sworn to and subscribed to before me, this 2d day of April, 1872.

B. McKINEY, *D. C.*

And as to the plea of *non est factum* above pleaded whereby the defendant put herself upon the country, the said plaintiff doth the like.

ROSE & HODGES, *Att'ys for Pl't'ff.*

21 And for further plea in this behalf the defendant says she does not owe the debt in the declaration mentioned. And of this she puts herself on the country.

ROGAN & JARVIS, *Att'ys for Def't.*

And the plaintiff also.

ROSE & HODGES, *Att'ys for Pl't'ff.*

And for further plea in this behalf defendant says she well and truly paid the debt in the declaration mentioned. And of this she puts herself on the country.

ROGAN & JARVIS, *Att'ys.*

And the plaintiff also.

ROSE & HODGES, *Att'ys for Pl'ff.*

And for further plea in this behalf defendant says she did not undertake and assume as plaintiff in his declaration hath alleged. And of this she puts herself on the country.

ROGAN & JARVIS, *Att'ys.*

And the plaintiff also.

ROSE & HODGES, *Att'ys for Pl'ff.*

22 Filed April 2, 1872.

B. McKINEY, *D. Clerk.*

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Court Minutes. Friday, Sept. 8th, 1871.

Circuit Court, Claiborne County.

Court met pursuant to adjournment. Present and presiding the same judge, &c.

WALTER B. BROOKS, Assignee, &c., *vs.* CLAIBORNE COUNTY.

Came the parties, by their attorneys, and on motion of the plaintiff, and for satisfactory reasons shown to the court, the plaintiff has leave to file an additional count or counts to his declaration now on file, and two months' time to file the same; and the demurrer to the defendant's pleas to the declaration now on file remains undisposed of.

And the defendant, by consent of parties by their attorneys, has time until and including the second day of the next term of this court to plead or demurrer to the amended declaration of the plaintiff. And it is ordered by the court that the plaintiff pay the costs of this cause for this term.

Caption of the Court, January Term, 1872.

23 Be it remembered that at a circuit court, began and held for the county of Claiborne, at the court-house in Tazewell, on the first Monday in January, A. D. 1872, the same being the first day of said month, present and presiding the Honorable James H. Randolph, judge of the second judicial circuit of the State of Tennessee, who was appointed to hold said court, when the following proceedings were had, to wit:

John Y. Cladwick, sheriff of Claiborne county, Tennessee, returned into court the State's writ of *venira facias* served on the following good and lawful men of said Claiborne county, to wit: James King, David Williams, Henderson Rogers, Matison Dunn, John Freeman, John Cawood, Daniel Chumbley, B. F. Gulley, John A. Gilpin, W. E. Hatfield, Leroy Hurst, William Essissary, Wiley Rome, James Singleton, Elbert Dunsimore, Perry Breeding, Mason Poor, Timothy Whittaker, H'y White, A. M. Jennings, George Phelps, W. K. Reeter, John H. Carr, Isaac R. Lynch, Samuel C. Mink, out of which the court elected and impanneled a grand jury, consisting of the following persons, to wit: Timothy Whitaker, Elbert Dunsimore, John Cawood, William E. Hatfield,

B. F. Gully, James Singleton, James King, George Phelps,

24 Isaac R. Lynch, Perry Breeding, Mason Poor, Wiley Roe; and of whom the court appointed William K. Reetor foreman. They were then sworn and charged by the court as the law requires, and retired to consider their presentments.

The said sheriff of Claiborne county, also by his return, showed on the State's writ of *venire facias*, that he had summoned Thomas Kaylor, a constable of said county, to wait on the grand jury, and he was sworn and entered on his duties. The following are the travis jurors: Henry W. Mayers, Jason Russell, Madison Dunn, John Freeman, Daniel Chumbley, Button Gibbs, Leroy Hurst, Wm.

Essissary, D. F. Jennings, J. H. Carr, Isom Mayers, James C. Simmons. Rice Hayes having been summoned as constable to wait on the court, and failing to attend, Sheriff Chadwick waited upon the court and will receive pay therefor.

Court met pursuant to adjornment. Present and presiding, the same judge as on yesterday.

W. B. BROOKS, Assignee, *vs.* CLAIBORNE COUNTY.

25 Came the parties by their attorney, and the demurrer of the defendant to the second and third counts in the plaintiff's declaration, and also the demurrer of the plaintiff to the first, second, third, fourth, fifth, and sixth pleas of defendant filed to the first count in the declaration, came on to be argued, and after argument heard, the court is of opinion that the plaintiff's demurrer to the said first, second, third, fourth, and fifth pleas of defendant to said first count in the declaration is well taken, and should be sustained, and that the pl't'ff's demurrer to the said sixth plea of defendant, and also the defendant's demurrer to the said second and third counts in the declaration are not well taken and should be overruled.

It is, therefore, considered by the court that the said defendant, as to the said first, second, third, fourth, and fifth pleas by him pleaded, and also as to the demurrer by him taken to the said second and third counts, do answer over, and time is given the defendant until and including the first day of the next term of this court to do so, but so as not to delay. It is also considered
26 by the court that the plaintiff join issue upon the said sixth plea of defendant, wherein issue is tendered, and the same is done accordingly.

Caption of the Court. September Term, 1872.

THE STATE OF TENNESSEE:

Be it remembered that at a circuit court, began and held for Claiborne county, at the court-house in Tazewell, the first Monday of September, A. D. 1872, (the same being the second day of said month,) present and presiding the Honorable James H. Randolph, judge of the second judicial circuit in the State of Tennessee, who was duly elected, qualified and commissioned as judge in said State to hold the circuit courts in said circuit, when the following proceeding were had, to wit:

John Y. Chadwick, high sheriff of said county, returned into court the State's writ of *venire facias*, served on the following good and lawful men of said county, to wit: James Johnson, Isaac Lewis, Wm. Ausmus, Daniel Cawood, Matthew Sharp, H. F. Sharp, Martin Cadle, Wm. H. Crenshaw, Wm. Morgan, Daniel Rowland, Joseph Lanham, H. F. Craxsdale, John Hewerton, W. B.
27 Epperson, Willis Stone, Rob't G. Bartlet, S. H. Williams, James Debusk, Absolam Robinson, James Hodges, Wesley Knight, Rufus Mink, Daniel Chadwick, W. A. Ford, John McDaniel,

and John Fartener, a constable of said county, to wait on the grand jury, and out of the jury aforesaid the court impanneled a grand jury, which consisted of the following, to wit: Wiley A. Todd, Daniel Chadwick, H. F. Oroxdale, Wm. Morgan, Wm. Ausmus, John Howerton, A. Robinson, Thos. L. Davis, Daniel Cawood, S. H. Williams, James Debusk, Joseph Lanham, and John McDaniel. The court then appointed Wm. Ausmus foreman of the grand jury, and the jury was then sworn and charged according to law, and retired to consider of their presentments, under charge of John Fartener, a constable of Claiborne county, who was sworn as the law directs.

The traverse jury are composed of the following men, to wit: Geo. W. Leford was summoned in the place of D. Rowland excused, John Kwitt in place of Janus Johnson excused, Wm. M.
28 Carr in place of Mathew Sharp excused, J. C. Lane in place of H. F. Sharp excused, Daniel Chumbley in place of W. B. Epperson excused, James Hopson in place of James Hodges excused, and Martin Cadle, Willis Stone, Robert G. Bartlett, Wesley Knight, Rufus Mink, and Thos. Ausmus in place of Isaac Lewis excused.

TUESDAY, *Sept.* 3*d*, 1872.

Court met pursuant to adjournment. Present and presiding, the same judge as on yesterday.

The following proceedings were had:

W. B. BROOKS, Assignee, &c., *vs.* CLAIBORNE COUNTY.

This day came the parties by their attorneys. Thereupon this cause was continued by consent until the next term of this court.

Circuit Court, Claiborne County, Tennessee.

TUESDAY, *January* 7, 1873.

Court met pursuant to adjournment. Present and presiding, the Honorable James H. Randolph, judge, &c., when the following proceedings were had, to wit:

29 W. B. BROOKS, Assignee, &c., in bankruptcy of Howard, Cole & Co.,

vs.

CLAIBORNE COUNTY.

This day came the parties by their attorneys; thereupon this cause was continued by consent until the next term of this court.

Circuit Court, Claiborne County, Tennessee.

WEDNESDAY, *May 7th*, 1873.

Court met pursuant to adjournment. Present and presiding, the Honorable James H. Randolph, judge of the 2d judicial circuit, &c., when the following proceedings were had, to wit:

W. B. BROOKS, Assignee, &c., in bankruptcy of Howard, Cole & Co.,

vs.

CLAIBORNE COUNTY.

This day came the parties by their attorneys, and to try the issue

joined came a jury, to wit, N. S. Bartley, W. W. Greer, Winfroe Collins, Thos. Ausmus, Asher Rice, William Cardwell, John England, R. T. Poor, C. Francisco, John Minton, Asa Brogan, all good and lawful men of Claiborne county, who were elected, tried and
30 sworn to well and truly try the issue joined between the parties, and a true verdict render according to law and evidence upon their oath, were respited from rendering their verdict until to-morrow.

TUESDAY, *May 8th*, 1873.

Court met pursuant to adjournment. Present and presiding, the same judge as on yesterday, and the following proceedings were had, to wit:

W. B. BROOKS, Assignee in bankruptcy of Howard, Cole & Co.,
vs.
CLAIBORNE COUNTY.

This day came the parties by their attorneys, and came the same jury that were respited from rendering their verdict on yesterday until to-day, to wit, N. S. Bartlett, W. W. Greer, Winfer Collins, Thos. Ausmus, Asher Rice, William Cardwell, John England, R. T. Poor, C. Francisco, John Minton, H. W. Myers, and Asa Brogan, all good and lawful men of Claiborne county, who were elected, tried and sworn to well and truly try the issue joined between the parties, and a true verdict render according to law and evidence,
31 upon their oath do say they find in favor of the def't; thereupon the plaintiff, by his attorney, entered a rule to show cause why the verdict of the jury should be set aside and a new trial granted.

W. B. BROOKS, Assignee, &c., in bankruptcy of Howard, Cole & Co.,
vs.
CLAIBORNE COUNTY.

In this cause the rule heretofore entered, to show cause why the verdict of the jury should be set aside and a new trial granted, coming on to be heard, and argument of counsel being heard on both sides, and the court, fully understanding the premises, discharged said rule and refused a new trial, it is therefore considered by the court that the defendant recover from the plaintiff and his security for the prosecution of this suit, R. M. Barton, James P. Evans, and Wm. McFarland, all the costs of this cause, for which execution is awarded.

To which action of the court in discharging said rule and refusing a new trial, the plaintiff accepts in law, and tenders his bill of exceptions, which is by the court, signed, sealed and ordered
32 to be made a part of the record in this cause, and prays an appeal in the nature of a writ of error from the judgment of this court to the next term of the supreme court of the State of Tennessee, to be held at Knoxville on the second Monday of October next. And it appearing to the court that the plaintiff is a non-res-

ident of the State of Tennessee, the court is pleased to grant said appeal, upon the plaintiff filing his appeal bond with the clerk of this court within twenty days from this date, and the record ordered to be certified. The bill of exceptions above referred to is accordingly filed, marked Exhibit X.

Judgment of the Supreme Court.

STATE OF TENNESSEE:

Supreme Court at Knoxville, Sept. Term, 1874.

OCT. 3D, 1874.

W. B. BROOKS, Assignee of Howard, Cole & Co.,
vs.
CLAIBORNE COUNTY.

The record having been read, and argument of counsel
33 heard, and the court being of opinion that there is error in the record of the court below, it is therefore considered that the judgment of the circuit court of Claiborne county in this case be, and the same is hereby, reversed, and the cause remanded to said circuit court for a new trial, and that the costs of this court be taxed and certified for allowance and payment out of the county treasury of said Claiborne county.

STATE OF TENNESSEE:

I, J. F. Deaderick, clerk of the supreme court of said State, at Knoxville, do hereby certify that the foregoing is a full and true copy of the judgment pronounced by said court in the cause therein named, at its September term, 1874, as the same appears of record in my office.

Given under my hand and the seal of said court, at office in Knoxville, this 21st day of December, 1874.

——— ———, *Clerk.*

Procedenda No. 90.

W. B. BROOKS, Assignee,
vs.
CLAIBORNE COUNTY. } Issued Dec. 21, 1874.

STATE OF TENNESSEE:

34 To the honorable the judge of the circuit court of Claiborne county, holding and presiding at Tazewell, Tennessee:

Whereas, in our supreme court at Knoxville, at the September term, 1874, it was adjudged and ordered in this cause—W. B. Brooks, Assignee, *vs.* Claiborne County, appealed to our said court from said circuit court—that the same be remanded thereto for further proceedings and final determination therein.

These are, therefore, to command you, the court as aforesaid, that you proceed with the execution of this judgment of our said supreme

court by such further proceedings in your court as shall effectuate the objects of this order to remand, and attain the ends of justice.

Witness J. F. Deaderick, clerk of our said court, at office in Knoxville, the second Monday of September, 1874.

J. F. DEADERICK, *Clerk.*

Caption of the January Term, 1875.

Circuit Court of Claiborne County.

JANUARY 9TH, 1875.

Court met pursuant to adjournment.

35 Present and presiding: The Honorable James H. Randolph, judge, &c. The following proceedings were had, to wit:

W. B. BROOKS *vs.* CLAIBORNE COUNTY.

This cause is continued by consent of parties until the next term of this court.

Circuit Court Claiborne County, Tennessee.

TUESDAY, *Sep. 7th,* 1875.

Court met pursuant to adjournment.

Present and presiding: The Honorable James H. Randolph, judge, &c., of the 2d judicial circuit. When the following proceedings were had, to wit:

W. B. BROOKS, Assignee, &c., *vs.* CLAIBORNE COUNTY.

Came the parties by their attorneys, and thereupon the plaintiff filed his petition, praying that this cause be removed to the next term of the circuit court of the United States, to be held at Knoxville, Tennessee, and also moved the court to grant the prayers of said petition, pursuant to the act of Congress passed March

36 the 2d, 1867; and it appearing from the affidavit of the plaintiff on file that he is, and was at the institution of this suit, a non-resident of the State of Tennessee and resident of the State of Maryland; that the defendant's corporation was created by act of the General Assembly of Tennessee, and a resident thereof; that the amount in controversy in this suit exceeds the sum of five hundred dollars, exclusive of costs; that the plaintiff has reason to and does believe that from prejudice and local influence in said county he cannot get justice therein; and that he has made and filed a bond conditioned as required by said act of Congress.

Therefore it is considered by the court that this cause be removed to the next term of the circuit court of the United States, to be held for the eastern district of Tennessee, at Knoxville, Tennessee, for trial, and that the clerk make out and certify copies of the process, pleadings, depositions, testimony, and other proceedings in said cause in this court, pursuant to said act of Congress passed March 2d, 1867; and that the plaintiff have leave to withdraw from

37 the files the original bond in the declaration, mentioned as the foundation of the action for evidence in said United States

circuit court. Said petition, affidavit, bond, marked, respectively, "A," "B," and "C," and filed in this court, are hereby made a part of the record in this cause, and copies thereof will be made out and certified, along with the other proceedings in this cause, to said United States court. The clerk will also attach a statement of the bill of costs.

Appeal Bond.

W. B. BROOKS, Assignee, *vs.* CLAIBORNE COUNTY.

We, Walter B. Brooks, James P. Evans, and James G. Rose, acknowledge ourselves indebted to Claiborne county in the sum of two hundred and fifty dollars, but to be void on condition that the above bound Walter B. Brooks doth on the first day of the next term of the circuit court of the United States, at Knoxville, enter in such court copies of all process, pleadings, depositions, and other proceedings in the circuit court of Claiborne county, Tennessee, wherein said Brooks, assignee, &c., is plaintiff and said county is defendant, and doth also such other appropriate acts as by
38 the acts of Congress in such cases made and provided may require on the removal of a cause from the State courts to the United States courts.

Otherwise to remain in full force and effect.

This the 3d of September, 1875.

WALTER B. BROOKS, [SEAL.]
By Attorney J. G. Rose.
JAMES G. ROSE. [SEAL.]
JAMES P. EVANS. [SEAL.]

Exhibit "C," filed Sept. 7th, 1875.

THOS. W. STONE, *Clerk.*

Petition.

WALTER B. BROOKS, Assignee, *vs.* CLAIBORNE COUNTY.

To the Honorable James H. Randolph, judge of the circuit court of Claiborne county, Tennessee, now sitting at Tazewell:

Your petitioner, Walter B. Brooks, assignee in bankruptcy of Howard, Cole & Co., represents unto your honor that he's plaintiff in an action of debt now pending in your honorable court, wherein Claiborne county is defendant; that he was at the institution
39 of said action, and from thence hitherto has been, and still is, a non-resident of Tennessee and citizen of the State of Maryland; that the amount in controversy in said action exceeds the sum of five hundred dollars, exclusive of costs; that the defendant's corporation was created by the laws of Tennessee, and is a citizen thereof; that your petitioner has made and filed in this honorable court his affidavit in writing, stating the above facts, and the further fact that all the citizens of Claiborne county are interested in said suit; that an impartial and disinterested jury cannot be had in this court; that petitioner has reason to and does believe that, from prejudice and

local influence, he will not be able to obtain justice in this honorable court in said cause.

Said affidavit, marked Exhibit "A," is hereby made a part of this petition. Your petitioner therefore prays that said suit be removed to the next circuit court of the United States, to be held at Knoxville, for the eastern district of Tennessee, for trial in said circuit court of the United States.

40 And he hereby offers bond with good and sufficient surety for his entering in such circuit court on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and for the doing of such other appropriate acts as by the acts of Congress in such cases made and provided are required to be done upon the removal of a suit from a State court into the United States court.

And your petitioner will ever pray, &c.

JAMES G. ROSE,
Attorney for Plaintiff.

Exhibit "B." Filed Sept. 7th, 1875.

THOS. W. STONE, *Clerk.*

Affidavit.

WALTER B. BROOKS, Assignee, *vs.* CLAIBORNE COUNTY.

Exhibit "A." Filed Sept. 7th, 1875. Thos. W. Stone, Clerk.

THE STATE OF MARYLAND, *City and County of Baltimore:*

Personally came Walter B. Brooks before the undersigned, William W. Latimer, a "commissioner of the State of Tennessee," in said county and city of Baltimore, duly commissioned and

41 qualified as such, according to the laws of the State of Tennessee, and the said Walter B. Brooks, to me personally known, after being legally sworn by me, in the city and county aforesaid, deposes and says, as follows, to wit:

That on the 28th day of February, 1871, he then was, and from thence hitherto has been, and still is, a resident of the city and county of Baltimore, State of Maryland, and consequently a non-resident of the State of Tennessee. Affiant, on the said 28th February, 1871, being then and now the assignee in bankruptcy of George W. Howard, John H. Cole, and H. F. Schurman, late partners in trade under the firm name of "Howard, Cole & Co.," brought his action for debt as such assignee in the circuit court of Claiborne county, Tennessee, against the said county of Claiborne, a corporation and body politic created by act of the General Assembly of the State of Tennessee, in which action or suit the plaintiff demanded of the said defendant the sum of five thousand dollars debt, and the further sum of three thousand dollars damages for the de-

42 tention thereof. Said action is still pending and undetermined in said circuit court of Claiborne county, Tennessee, no final trial thereof having been had in said court.

And so affiant states that in the matter of said suit there is controversy between himself, as plaintiff, now and at the bringing of said suit a citizen of the State of Maryland, and the defendant corporation, now and then a citizen of the State of Tennessee. And the matter in dispute in said suit exceeds the sum of five hundred dollars, exclusive of costs. Affiant further states that the citizens and tax payers in said county of Claiborne are interested in the result of said suit; that an impartial and disinterested jury cannot be had in said circuit court, and that he has reason to and does believe that, from prejudice and local influence in said county of Claiborne, where said suit is pending, he will not be able to obtain justice in said circuit court.

Affiant prays that said suit be removed from said circuit court to the next circuit court of the United States to be held for the
43 eastern district of Tennessee, at Knoxville, Tennessee, pursuant to act of Congress passed March 2d, 1867.

WALTER B. BROOKS.

Sworn and subscribed before me, by the said Walter B. Brooks, at Baltimore, this 2d day of September, A. D. 1875. As witness my hand and official seal.

W. W. LATIMER,
A Commissioner for Tennessee, in Baltimore City, Maryland.

Bill of Costs, accrued before this cause went to the Supreme Court.

State tax, $5.00; county tax, $5.00	$10 00
Clerk J. N. Treece—Prosecution bond, .25; summons, .75; copying pros bond, .25; docketing, $1.50; filing declaration, .25; filing pleas, $1.50; filing amended declaration, .25; filing demurrer to pleas, .25; issuing 5 subpœnas, .50; leave to file additional counts, .25; time given to plead, .25; 2 continuances, by consent, .50; jury, .10; respite, .25; rule verdict, .25; new trial, .25; same discharged, .25; judgment, .75; appeal and appeal bond, .75; probates, .25; making transcript, $12.19; certificate and seal, .50	22 04
44 D. Clerk B. McKiney—Filing plea of *non est factum*, .25; filing demurrer to amended declaration, .25; docketing, .30; order sustaining demurrer to pleas, .25; order overruling demurrer to declaration, .25	1 30
Sheriff J. Y. Chadwick.—Executing summons, $1, ex. 5 sub'p's, $1.25	2 25
Witness Thos. L. Davis—7 days, at $1; 4 ferriages, .40	7 40
" W. P. Parker—4 days, at $1	4 00
" Vincent Moyers—4 days, at $1	4 00
" D. Cardwell—1 day, at $1	1 00
" Benjamin Ausmus—2 days, at $1	2 00
" James Carr—2 days, at $1	2 00

Bill of Costs in this cause from the May term, 1873, to Sept. term, 1875, in the circuit court of Claiborne county, Tennessee.

Clerk Thos. W. Stone—4 docketing, .40; 1 continuance, by consent, .25; filing affidavit to change venue, .25; filing bond, .25; filing petition to change venue, .25; order changing venue, .25; making transcript, 7,050 words, at ten cents per hundred, $7.05; taxing bill of costs, .50; certificate and seal to transcript, .50; postage, .36------- $10 06

45 STATE OF TENNESSEE, *Claiborne County:*

I, Thos. W. Stone, clerk of the circuit court of Claiborne county, do hereby certify that the foregoing is a true and perfect transcript of the record and bill of costs remaining in my office, in the case of W. B. Brooks, assignee, *vs.* &c., Claiborne County.

Given under my hand and seal of office, this September the 23, 1875.

[SEAL.] THOS. W. STONE, *Clerk.*

Endorsed: No. 594. Walter B. Brooks, assignee, &c., *vs.* Claiborne County. Filed January 10, 1876. H. M. Aiken, clerk.

Caption. United States Circuit Court.

Be it remembered, that at a circuit court of the United States, began and held for the eastern district, at the federal court room, in the city of Knoxville, within said district, and the sixth circuit, on the second Monday, it being the 12th day of July, A. D. 1880, present and presiding the Honorable John Baxter, judge of the
46 United States circuit court for the sixth judicial circuit, the following proceedings were had, to wit:

TUESDAY MORNING, *September 28th*, 1880.

Court met pursuant to adjournment. Present and presiding the Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

Judgment. U. S. Circuit Court.

W. B. BROOKS, Assignee in bankruptcy of George W. Howard, John H. Cole, and H. F. Schereman, partners under the firm name of Howard, Cole & Company,

vs.

CLAIBORNE COUNTY. } Debt. No. 594.

Came the parties by their attornies and came also the following jury, to wit: Rom Maloney, Lawson Irwin, Nathan Gammon, W. D. Williams, William Hodges, James S. Boyd, George W. Prater, W. K. Eckle, Martin Shea, Squire Hunter, S. K. Harris, and Hugh Martin, good and lawful men, citizens and free holders of the eastern district of Tennessee, who, being duly elected, tried, and sworn to try the issue joined between the plaintiff and defendant, upon
47 their oath do say that the defendant owes of the debt, in the

declaration mentioned, the sum of five thousand dollars, and do assess the damages, because of the detention thereof, at the sum of three thousand seven hundred and forty-one dollars and sixty-six cents.

Whereupon it is considered by the court that the plaintiff have and recover of the defendant said sum of five thousand dollars, together with the damages assessed by the jury, making in all the sum of eight thousand seven hundred and forty-one dollars and sixty-six cents, for which let execution issue.

WEDNESDAY MORNING, *September 29th*, 1880.

Court met pursuant to adjournment. Present and presiding: The Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

Order. U. S. Circuit Court.

W. B. BROOKS, Assignee, &c., *vs.* CLAIBORNE COUNTY. } Debt. No. 594.

Came the plaintiff, by attorney, and moved the court for a
48 new trial in this case, which motion, being considered by the court, is hereby overruled.

Bill of Exceptions.

In the Circuit Court of the United States for the Eastern District of Tenn., at Knoxville.

W. B. BROOKS, Assignee in Bankruptcy of Howard, Cole & Co.,
vs.
CLAIBORNE COUNTY.

Upon the trial of this cause plaintiff introduced proof tending *tending* to show that the county of Claiborne, by its county court, appointed commissioners, who contracted with one V. H. Sturm, for the erection of a court-house in Tazewell, the county seat.

That by original contract, which was in parole, the builder was to receive $8,000; that by authority of the county court the commissioners modified the contract so as to enlarge the building without fixing specifically the additional price to be paid.

That at the April term, 1868, of the county court, the following order was made and entered of record.

TAZEWELL, MONDAY, *April 6th*, 1868.

49 Be it remembered that at a court, began and held at the house for holding county court, in the town of Tazewell, for the county of Claiborne, and State of Tennessee, on the first Monday, it being the 6th day of April, 1868, present and presiding the worshipful Thomas L. Davis, chairman, George B. Needham, James Hodges, quorum; T. H. Bawman, Joseph Ausmus, W. W. Lynch, M. M. Rogers, James Carr, Mark Cadle, James C. Brown, A. H. Hatfield, Wm. H. Cunningham, Wm. Cook, G. W. Smith, James Mc-

Daniel, W. W. Parker, Henry Poor, Raymond Owens, W. W. Hollingsworth, and Wiley A. Ford, justices, and David Cardwell, clerk, the following proceedings were had, to wit:

"*Ordered* by the court that V. H. Sturm be allowed the sum of ten thousand dollars in part pay for the court-house."

STATE OF TENNESSEE, *Claiborne County:*

I, Eli Goin, clerk of the county court of said county, do hereby certify that the foregoing is a full, true, and perfect copy of the record, as now appears of record in my office.

50 In testimony whereof, I have hereto subscribed my name and affixed the seal of office of said court, at office in Tazewell, the 7th January, 1873.

[SEAL.] ELI GOINS, *Clerk.*

And at the January term, 1869, of the county court of Claiborne county term, the following additional order was made and entered of record:

STATE OF TENNESSEE, *Claiborne County:*

"Be it remembered, that at a quarterly court, began and held for the county of Claiborne, in the State of Tennessee, at the court-house in the town of Tazewell, on the first Monday of January, 1869, it being the fourth day of said month. Present and presiding: Thomas L. Davis, chairman, and presiding justice George B. Needham and James Hodges, quorum; and W. M. Rogers and Joseph Ausmus, W. W. Lynch, James Carr, Mark Cadle, James C. Brown, A. H. Hatfield, Thos. H. Cunningham, Wm. Cook, George W. Smith, A. M. Jennings, W. W. Hollingsworth, Wm. P. Parker, Henry Poor, Raymond Owens, J. M. Brown, Wiley A. Ford, and John

51 Gains, associate justices, when said court organized, and proceeded to the following business, to wit:

"It was this day ordered by the court that Benjamin Ausmus, revenue collector of Claiborne county, be permitted to examine and investigate the payment or transfer of certain county bonds issued in favor of V. H. Sturm, and whether or not said bonds have been paid, transferred, or assigned to any party for a full and valid consideration before the 7th July, 1868; and if so, that the said Ausmus, as revenue collector, be allowed to pay over or deposit what funds he may have on hand collected for that purpose to the person or persons holding the legal and lawful possession of said bonds. But should the bonds have been enjoined before or since the above date, then the money so collected and in the hands of said revenue collector will be deposited with the clerk of the chancery court at Knoxville, taking his receipt therefor."

STATE OF TENNESSEE, *Claiborne County:*

I, Eli Goin, clerk of the county court of said county, do

52 hereby certify that the above and foregoing is a full, true, and perfect copy of the caption of the record of the county

court of said county at its January term, 1869, and also a full, true, and perfect copy of the record of said court upon the subject to which it relates.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office in Tazewell, the 7th day of May, 1873.

[SEAL.] ELI GOIN, *Clerk.*

That the bond sued on was made and delivered to V. H. Sturm by the chairman of the county court, together with another similar bond, which has been paid.

The defendant introduced evidence tending to show: That the value of the additional work on court-house was $3,000; that between $10,000 and $11,000 had been paid to the contractor, V. H. Sturm, and his order outside of the amount called for in the bond sued on.

The defendant's attorney requested the court to instruct the jury—

53 *First.* That in the absence of express power conferred by statute, the county of Claiborne, as a corporation, had no power to make and issue a negotiable interest-bearing bond such as the one sued on, there being no implied power to issue such a bond.

Second. There being no authority for the issuance of such bonds, the chairman of the county court had no right to make or issue it, and the payment of a similar bond by the county would not operate as a ratification of this bond or make it valid.

Amongst other things not excepted to, the judge instructed the jury—

First. That the def't, Claiborne County, a corporation under the laws of Tennessee, through the county court, was authorized to erect a court-house; that the power to erect implied the right to contract for the same, and if the court had the right to make a contract for the erection of the court-house he instructed them; that the court had the incidental or implied power to execute a note, bond,

54 or other negotiable security in payment of such contract, and might legally issue such an instrument as the bond sued on.

The court further charged the jury that a corporation, with power to make a contract like an individual, might make and issue commercial papers as evidence of or security for the contract.

The court further instructed the jury that they would look to the evidence and ascertain whether the county court ordered the chairman to make the bond sued on; if it did not so ordered, the chairman had no power or authority to make it; but if, after its execution, the county court made an order on the tax collecter to hunt up the holders of this and another bond like this and pay it, that this would be a ratification of the action of the chairman, and would validate the bond sued on.

If the jury should so find, they would then find in favor of the plaintiff the amount of the bond and interest thereon at six

55 per cent. per annum from its date. The jury returned a ver-

dict for plaintiff for $5,000, the principal, and $3,741, interest, making $8,741.

The defendant entered a motion for a new trial, which was disallowed.

Defendant assigns as error so much of the charge of the court as is hereinbefore set forth, and excepts in law to said charge, and to the action of the court in refusing a new trial, and tenders this bill of exceptions, which is signed, sealed, and made part of the record.

D. M. KEY, [SEAL.]
District Judge.

Endorsed: No. 594. U. S. circuit court, E. D. of Tenn. W. B. Brooks, assignee, &c., *vs.* Claiborne County. Bill of exceptions. Filed Oct'r 15, 1880. A. R. Humes, clerk.

Citation.

The United States of America to W. B. Brooks, assignee in bankruptcy of Howard, Cole & Co., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 5th Monday of October, 1880, pursuant to a writ of error
56 filed in the clerk's office of the circuit court of the United States for the eastern district of Tennessee, at Knoxville, in the case wherein Claiborne County, Tennessee, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable D. M. Key, one of the judges of the district court of the United States, this 15th day of October, in the year of our Lord one thousand eight hundred and eighty.

D. M. KEY,
U. S. District Judge.

On this 15th day of October, in the year of our Lord one thousand eight hundred and eighty, personally appeared before me, the subscriber, A. Caldwell, att'y for Claiborne county, and makes oath that he delivered a true copy of the within citation to W. P. Washburne,
57 attorney for W. B. Brooks, assignee, &c., on this day.

A. CALDWELL.

Sworn to and subscribed, the 15th day of October, A. D. 1880.

A. R. HUMES, *Clerk.*

Bond.

Know all men by these presents that we, Claiborne county and Harvey Ritchie and Jesse L. Rogers, are held and firmly bound unto W. B. Brooks, assignee in bankruptcy of Howard, Cole & Co., in the full and just sum of two hundred and fifty dollars, to be paid to the said W. B. Brooks, assignee, &c., or his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be

made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 5th day of October, in the year of our Lord one thousand eight hundred and eighty.

Whereas lately at a circuit court of the United States for the eastern district of Tennessee, at Knoxville, in a suit depending
58 in said court, between W. B. Brooks, assignee in bankruptcy of Howard, Cole & Co., and Claiborne County, Tennessee, a judgment was rendered against the said Claiborne county; and the said Claiborne county having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said —— ——, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next.

Now, the condition of the above obligation is such that if the said Claiborne county shall prosecute the writ of error to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

CLAIBORNE COUNTY. [L. S.]
HARVEY RITCHIE. [L. S.]
JESSE L. ROGERS. [L. S.]

Sealed and delivered in presence of—
[SEAL.] J. D. MAYES, *J. P.*

Approved by D. M. Key, U. S. district judge.

59 Endorsed: No. 594. W. B. Brooks, assignee, &c., *vs.* Claiborne County. Bond. Filed Oct. 15th, 1880. A. R. Humes clerk.

UNITED STATES OF AMERICA, } *ss:*
Circuit Court, Clerk's Office, Eastern District of Tennessee, }

I, A. R. Humes, clerk of the United States circuit court for the eastern district of Tennessee, do hereby certify that the foregoing transcript is a true copy of papers deemed necessary for the prosecution of the writ of error in the case mentioned in the caption, to wit, W. B. Brooks, assignee, &c., *vs.* Claiborne County, as the same now appear on file in my office.

In testimony whereof, I hereto subscribe my name officially, and affix the seal of said court, at Knoxville, on this, the 17th day of November, A. D. 1880, and in the year of our Independence the 105th.

[SEAL.] A. R. HUMES,
Clerk U. S. Circuit Court, Eastern Dist. of Tenn.

60 This transcript, certificate, and seal $11 60
Issuing writ of error 1 00
Bond, 30c.; filing same, 10c 40

$13 00

Received payment, Nov'r 29, 1880, of A. Caldwell & Son, att'ys for Claiborne county.

A. R. HUMES, *Clerk.*

61 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Walter B. Brooks, assignee of Howard, Cole & Co., plaintiff, and Claiborne County, a manifest error hath happened, to the great damage of the said Claiborne county, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Morrison R. Waite, chief justice of the said Supreme Court the 14th day of October, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.]

A. R. HUMES,
Clerk of the Circuit Court of the United States for the Eastern District of Tennessee.

Endorsed: No. 594. United States circuit court, eastern district of Tennessee. W. B. Brooks, assignee, &c., *vs.* Claiborne County. Writ of error. Filed Oct. 15, 1880. A. R. Humes, cl'k.

62 The United States of America to W. B. Brooks, assignee in bankruptcy of Howard, Cole & Co., Greeting:

You are hereby admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 5th Monday of October, 1880, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States, for the eastern district of Tennessee, at Knoxville, in the case wherein Claiborne County, Tennessee, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable D. M. Key, one of judges of the district court of the United States, this 15th day of October, in the year of our Lord one thousand eight hundred and eighty.

D. M. KEY, *U. S. District Judge.*

63 On this 15th day of October, in the year of our Lord one thousand eight hundred and eighty, personally appeared before me, the subscriber, A. Caldwell, att'y for Claiborne county, and makes oath that de delivered a true copy of the within citation to W. P. Washburn, attorney for W. B. Brooks, assignee, &c., on this day.

A. CALDWELL.

Sworn to and subscribed, the 15th day of October, A. D. 1880.

A. R. HUMES, *Clerk.*

Endorsed on cover: E. Tennessee C. C. U. S. No. 234. Claiborne County, plaintiff in error, *vs.* Walter B. Brooks, assignee of Howard, Cole & Company. Filed 1st April, 1881.

111-480

MAR 31 1894

CLAIBORNE COUNTY, IN ERROR,

No. 234.

VS.

W. B. BROOKS, ASSIGNEE, &c.

—IN—

Supreme Court of the United States.

ARGUMENT OF COUNSEL FOR PLAINTIFF IN ERROR.

Argument and Brief

FOR

Plaintiff in Error,

—BY—

JESSE L. ROGERS,

DANDRIDGE, TENN.

CHRONICLE STEAM PRINT, KNOXVILLE.

CLAIBORNE COUNTY, IN ERROR,

No. 234.

vs.

W. B. BROOKS, ASSIGNEE, &c.

Supreme Court of the United States.

ARGUMENT OF COUNSEL FOR PLAINTIFF IN ERROR.

The plaintiff in error, Claiborne county, one of the counties of Tennessee, through its County Court, appointed Commissioners who contracted, in parol, with one V. H. Sturm for the erection of a court house at Tazewell, the county seat of said county. By the original contract the builder Sturm was to receive $8,000.00 for the erection of the building according to certain plans and specifications agreed upon. Subsequently the County Court authorized the Commissioners to modify the plan of the building by enlarging the same, which they did and contracted with said Sturm to do the additional work without fixing the additional price.

At the April term, 1868, when the building was approaching completion, but was not yet finished, the County Court made and entered of record the following order:

"Ordered by the Court that V. H. Sturm be allowed the sum of ten thousand dollars in part pay for the court house."

Claiborne County, in Error,

vs.

W. B. Brooks, Assignee, &c.

Upon the above order of appropriation, which was made by the County Court on April 6, 1868, the Chairman of the County Court executed the instrument sued on and another similar one, which was afterwards paid. The one in suit is as follows:

"THE STATE OF TENNESSEE,
COUNTY OF CLAIBORNE.

COUNTY COURT, April Term, 1868.

On or before the first day of January, 1870, *the county of Claiborne is hereby bound and promises to pay to V. H. Sturm or order, the sum of ten thousand dollars, bearing interest from this date at the rate of six per centum per annum until paid. And this bond is redeemable by the county at any earlier date, if they choose to do so.*

By order of the County Court of said county, at its quarterly term, on the first Monday of April, 1868, *a majority of the acting Justices of the Peace for said county having voted the same, and ordered the bond of the county to be issued therefor.*

Witness, Thomas L. Davis, Chairman of the County Court of said county, and the seal of the court, this seventh day of April, 1868. THOS. L. DAVIS, *Chairman.*

[Official Seal]

Attest:

David Caldwell, *Clerk.*

Endorsed:

"Pay to Howard, Cole & Co., waiving demand, notice and protest. VICTOR H. STURM."

At the January term, 1869, the further order was made by said County Court and entered of record as follows:

"It was this day ordered by the court that Benjamin Ansmus, Revenue Collector of Claiborne county be permitted to examine

and investigate the payment or transfer of certain county bonds issued in favor of V. H. Sturm, and whether or not said bonds have been paid, transferred or assigned to any party for a full and valid consideration before the 7th July, 1868, and if so, that the said Ausmus, as Revenue Collector, be allowed to pay over or deposit what funds he may have on hand collected for that purpose, to the person or persons holding the legal and lawful possession of said bonds. But should the bonds have been enjoined before or since the above date, then the money so collected, and in the hands of said Revenue Collector, will be deposited with the Clerk of the Chancery Court at Knoxville, taking his receipt therefor."

The proof shows that the value of the additional work on the court house, done under the last or modified contract was $3,000.00, and that Sturm, the Contractor, had been paid between $10,000.00 and $11,000.00 outside of the amount called for in the bond sued on.

The plaintiff in error, through its agents, refused to pay the instrument sued on and on February 28, 1871, W. B. Brooks, the Assignee in bankruptcy of Howard, Cole & Co., brought suit on this bond in the Circuit Court of Claiborne county.

The court will observe that the declaration bases the cause of action upon this instrument and upon it alone. There is no count upon any original consideration. There were two counts in an amended declaration in assumpsit, but they were abandoned in the Court below.

The defendant pleaded *nil debit*, and raised the question that neither the County Court of said county nor the Chairman thereof had authority to issue such a paper as that in suit, or bind the county for the payment thereof.

Upon the issues joined the case was tried in the Circuit Court

of Claiborne county at the May term, 1873, resulting in a verdict in favor of defendant; but upon an appeal in error to the Supreme Court of the State the judgment of the trial court was reversed for errors in the admission of testimony, and the case was remanded for another trial

Brooks vs. Claiborne County.
8 Baxter's, Tenn. Rep., p. 43.

At the September term, 1875, of said Circuit Court, upon the petition of the plaintiff, Brooks, the case was removed from said court to the Circuit Court of the United States, for the Eastern District of Tennessee at Knoxville, where it was tried at the September term, 1880, before his honor, D. M. Key, and a Jury, resulting in a verdict in favor of Brooks for $5,000.00, the principal, and $3,741.00 interest, making together $8,741.00. Defendant's motion for a new trial was overruled, judgment was rendered in plaintiff's favor for the amount found by the jury and costs; the defendant took a bill of exceptions and prosecutes a writ of error to this court.

Counsel for plaintiff in error, requested the trial Judge to charge the jury:

1st. "In the absence of express power confered by statute, the county of Claiborne, as a corporation, had no power to make and issue a negotiable, interest-bearing bond, such as the one sued on, there being no implied power to issue such a bond.

2d. "There being no authority for the issuance of such bond, the chairman of the County Court had no right to make or issue it, and the payment of a similar bond by the county, would not operate as a ratification of this bond or make it valid."

Instead of giving the above instructions, the trial Judge charged the Jury:

1st. That the defendant, Claiborne county, a corporation un-

der the laws of Tennessee, through the County Court, was authorized to erect a court-house; that the power to erect implied the right to contract for the same; and if the court had the right to make a contract for the erection of the court-house, he instructed them that the court *had the incidental or implied power to execute a note, bond, or other negotiable security in payment of such contract, and might legally issue such an instrument as the bond sued on.*

"That a corporation, with power to make a contract like an individual, might make and issue commercial paper as evidence of or security for the contract."

"The jury was instructed to look to the evidence and ascertain whether the County Court ordered the chairman to make the bond sued on? If it did not so order, the chairman had no power or authority to make it; *but if, after its execution, the County Court made an order on the tax collector to hunt up the holder of this and another bond like this, and pay it; that this would be a ratification of the action of the chairman, and would validate the bond sued on.* If the jury should so find, they would find in favor of the plaintiff the amount of the bond and interest thereon at six *per cent. per annum* from its date."

We assign as error the charge of the court as above set out, and his refusal to charge as requested.

Before proceeding with the argument, allow us to observe that the plaintiff in error is not seeking to avoid the payment of a just debt upon a technical quibble, as was insisted by counsel for the claimant in the court below; but, on the contrary, the proof shows that Claiborne county has paid every dollar her court-house was worth, and the builder received from her treasury every cent he earned; so that the moral equity of the case as well as the law, as we insist is with the plaintiff in error.

Record, p. 22

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ARGUMENT.

The questions presented are:

1st. Has the County Count of Claiborne county, under the general law of the State, the implied or incidental power to issue a commercial, interest-bearing bond, such as the one in suit?

2d. If this question is affirmatively answered, did the County Court, as a matter of fact authorize the issuance of this bond?

3d. If it did not, it did in a legal and bindingway ratify the action of the chairman in the issuance of this bond,

The question of the power or want thereof of the County Courts of Tennessee to issue negotiable paper, has never been adjudged by the Supreme Court of that State.

Let us examine the statute of Tennessee in reference to the civil divisions of the State and ascertain the defined powers of the counties:

Section 402, under "Incorporation and Organization of Counties," reads:

"Every county is a corporation, and the Justices in the County Court assembled are the representatives of the county, and authorized to act for it.

§403. "Suits may be maintained against a county *for any just claim*, as against other corporations; and process shall be served on the presiding officer of the County Court.

§404. "Each county may acquire and hold property for county purposes, and make all contracts necessary or expedient for the

management, control and improvement thereof, and for the better exercise of its civil and political powers, may make any order for the disposition of its property, and may do such other acts and exercise such other powers *as may be allowed by law.*"

Under article, "County Buildings," we find these provisions:

"§ 408. It is the duty of the County Court to erect a court-house, jail, and other necessary county buildings.

"§ 409. Applies to sites and the erection of county offices.

"§ 410. Requires the public buildings to be in the county town.

"§ 411. The county buildings are to be erected and kept in order and repair at the expense of the county, under the direction of the County Court; *and it may levy a special tax for the purpose.*

"§ 4179. The County Court consists of the Justices of the county, and is held on the first Monday of each month.

"§ 4180. Divides it into a quarterly and quorum court, the latter to meet monthly and the former every three months.

"§ 4187. The presiding officer of the court is a chairman.

"§ 4190. A majority of the Justices of the county is required to levy a tax, or to appropriate public money to an amount over $50.00."

§ 4215 Declares the purposes for which the Justices of the county may appropriate the public moneys, and § 4216 prohibits the appropriation for any other purpose; and § 4217 is as follows:

"*No money shall be drawn out of the county treasury except upon a warrant signed by the Chairman of the County Court, or by the County Judge where provided for.*"

"§ 421. The Judge or Chairman of the County Court shall be

the accounting officer and general agent of the county; and as such he shall have power and it shall be his duty:

"1. To have the care and custody of all the county property, except such as by law is placed in the custody of other officers.

* * * * * * *

"4. To audit all claims for money against the county.

"5. To draw all warrants on the county treasury.

* * * * * * *

"8. To enter in a book to be known as the warrant book, in the order of issuance, the number, date, amount, and name of the drawee of each warrant drawn upon the treasury.

"§ 422. *No money shall be drawn out of the treasury of the county except upon the warrant of the Judge or Chairman of the County Court.*"

By § 427: "It shall be the duty of the County Trustee, who is the County Treasurer.

* * * * * * *

"3. When a warrant is presented to him for payment, to enter in a book, kept by him for that purpose, ruled in columns, so as successively to show the number, payee or holder, date, day of presentation, and amount of the same.

"4. If there be funds in the treasury, not otherwise appropriated, *immediately* to pay the demand and take up the warrant; otherwise to deliver it to the owner with the number endorsed, and afterwards to pay it in its numerical order."

By sections 429, 431 and 3613 stringent provisions and summary remedies are given for the enforcement of the payment of warrants in accordance with these provisions, under severe penalties on the trustee.

Now, we concede these statutes give to the County Court the express authority to erect a court-house; and they give the ex-

press (and not implied power as the learned Trial Judge from his charge seemed to think,) to contract a debt for that purpose; they at the same time fix and designate in express terms the mode in which this power is to be exercised and the character and kind of paper that the County Court, through its chairman, may issue as a means of payment and an evidence of such indebtedness.

They prescribe a mode of procedure, and the way, and *the only way*, in which the debt may be evidenced and the money drawn from the treasury in payment thereof.

While we concede the correctness of the proposition as announced by the trial Judge, "that a corporation, with power to make a contract, like a individual, may make and issue commercial paper as evidence of or security for the contract," as applied to private corporations in the abstract, yet when applied to the facts of this case, in view of the statutes of Tennessee above quoted, fixing the powers and designating and prescribing the manner in which the same shall be exercised by counties, it was manifestly erroneous and misleading.

The rule in reference to municipal bodies is the reverse of that announced by the learned Judge, especially when the mode of exercising powers is fixed by the statutes creating corporations or defining their powers. 15 Wal 566; 19 Wal 460; Rees

Here is a *quasi* corporation, Claiborne county, created for the purpose of local government, given the right to build a court-house and to contract a debt for that purpose, which the county can raise money to pay only in one way—by taxation—and when this money is thus raised how can it be drawn from the treasury? The answer is in the mode fixed by statute, if the statute fixes a mode, and in this instance it does:

"No money shall be drawn out of the county treasury except upon the warrant of the Judge or Chairman of the County Court." §§ 422 and 4217.

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"No money shall be drawn out of the county treasury except upon the warrant of the Judge or Chairman of the County Court." §§ 422 and 4217.

This not only fixes a mode of payment and the character of

indebtedness that may be issued, but it expressly excluses every other mode and every other kind of evidence of indebtedness that may be issued. It is not only an enabling statute, but it is also prohibitory in its provisions. While it enables the County Court to issue a *warrant* as an evidence and means of paying a debt; it at the same time *prohibits the issuance* of any other kind of evidence of debt or the resort to any other mode or means of payment.

Neither can it be said that this statute is directory in its provisions; it not only goes to the form but to the substance of the subject matter; it not only allows the doing of a thing in a certain way, but negative words are employed, which forbid the doing of the act in any other way or manner than as directed.

Cooley's Cons. Limitations, 77–78,
1 Baxter Tenn. Rep. 60.

Thus money may be drawn from the county treasury in a certain way, but in no other way. A warrant may be issued as an evidence of debt, but nothing else can be issued but a warrant. It occurs to us that there is no mistaking these plain and mandatory provisions.

Again: The rule is general and applicable to the corporate authorities of all municipal bodies, that *where the mode in which their power* on any given subject can be exercised is prescribed by the statute under which they act, the mode as fixed must be followed; and if not done in the manner prescribed, the act is a mere nullity.

Zottman vs. San Francisco, 20 Cal., 96.

M. Speden vs. Mayor of New York, 7 Bosw, 601; 20 How. Pr., 396; Abb. Corp. Dig., 869, 522.

City of Leavenworth vs. Rankin, 2 Kans., 357, 371; 16 Ind., 227; 7 Gray 12.

Cooley on Cons. Lim.: 196, 215 and note.

White vs. Mayor and Aldermen of Nashville, 2 Swann, 364.

Clark vs. City of DesMoines, 19 Iowa, 209.

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Police Jury vs. Britton (15) Wallace, 566, which *is identical* in its facts and presents the very question raised in case at bar and adjudges that question in our favor. The court said: "to concede the power in townships, counties and parishes to issue negotiable paper, payable at a future day, which may be valid and binding in the hands of innocent purchasers, there would be no end to the fraud that would be perpetrated."

We might well say the same in this case, for here is an effort to compel a county to pay a claim it does not justly owe.

To same effect is Dillon on Municipal Bonds, § 6, p. 12–13, *et seq.*
Daniel on Negotiable Instruments, vol. 1, § 420, 421–2, 427, 11 Cal. 170.
Wall vs. County of Monroe, 13 Otto, 74.
The Mayor vs. Ray, 19 Wallace 468, *a strong case.*
Wells vs. Supervisors, 12 Otto, 625; *to same effect.*
Daniel on Negotiable Instruments, vol. 2, § 1530.

The power to contract the debt does not imply the power to issue negotiable instruments.

Aspinwall vs. Comr. of Davies Co., 22 How., 364.

Burroughs on Public See pp 171-197

This court expressly decided the very question raised in this case, in case of Police Jury vs. Britton, 15 Wallace, 566. That a county with power to contract a debt, has not power to issue a negotiable instrument as an evidence of that debt. That case is conclusive of the questions raised in this case. There is no distinguishing them; and the reasoning of the court in that case applies with all its force to this case. *To give the county authorities the power contended for in this case would make this claim unimpeachable in the hands of the defendant in error, cut off all equities and compel the taxpayers of Claiborne county to pay this unjust demand, not because they owe the debt, but simply bacause it is evidenced by a negotiable instrument, falling due at a future day, possessing all the attributes of a commercial security.*

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In the case in 2 Swann the court says: "It is unquestionably true that, in addition to the incidental powers and capacities tacitly conferred by law upon a corporation, there may also be implied powers, in order to carry into effect the powers expressly granted, or to effect the purposes of its creation; *but when a corporation is endowed, by its charter, with power to make a specific by-law in a certain case and for a certain purpose, its power of legislation is restricted to the case and object specified, all others being excluded by implication. When the power imparted to the corporation and the manner of its exercise are expressly defined in the statute, they must be strictly pursued.*"

To the same effect is the case of Mayor and Aldermen of Nashville vs. Hagan.

9 Baxter, Tenn. Reports 495.
Also Winston vs. Tenn. & Pacific R. R. Co., 1 Bax., 60.

All the Tennessee cases and the cases from other States, so far as we have been able to examine, recognize this principle as well settled; and we submit that the cases that declare the rule to be, as announced by the trial Judge: "that a corporation "with power to make a contract, like an individual, can make "and issue negotiable paper as evidence of or security for the "contract," *are cases where the power to contract is given without defining or restricting in any way whatever the mode or manner of exercising that power, or where the power is expressly given.*

Union Bank vs. Jacobs, 6 Hump. 515
2 Swann, Tenn. Rep. 372.
9 Heis. Tenn. Rep. 531.
9 Heis, Tenn. Rep. 518.
1 Sneed, Tenn. Rep. 698.
8 Baxter, Tenn. Rep. 587.
9 Baxter, Tenn. Rep. 495.
16 Wallace, 12.

And these cases all recognize the rule as above stated, that where a mode of exercising a power is prescribed, it must be exercised in that mode or the act is a nullity and confers no right upon any one.

Apply these principles to the present case and what is the result? Here is a *quasi* corporation that may contract a debt for a certain purpose, in a certain way; the statute declaring that purpose and fixing that way; the debt having been created, then the statute declares how it shall be paid and the kind of paper that may be issued as a means of payment and an evidence of the debt; and the very same sections of the statute that does this, expressly forbids the payment in any other way, or the issuance of any other evidence of the debt than that fixed by law. It shall be paid out of the treasury of the county, upon the "*warrant*" of the chairman, and in no other way. "No money shall be drawn out of the county treasury except upon warrant of the chairman of the County Court."

Code of Tennessee, §§422 and 4217.

To allow the payment of the instrument in suit would be to nullify and set at naught these very wholesome statutory provisions. It would be drawing money out of the county treasury in a wholly different way from that fixed by statute—upon an interest-bearing negotiable bond, and not upon the chairman's "warrant."

What is this "warrant" of the chairman of the County Court upon which alone money may be drawn from the county treasury?

This question has been settled by the Supreme Court of Tennessee. "It is an order drawn by the chairman upon the county "treasurer for the payment of money, and is a mode of reaching "money in the county treasury, by having one officer audit and "another to pay each claim in a prescribed order; the war-

"rant being intended to furnish a voucher to the disbursing "officer for his payments. *There is not the least intimation of "an intention to create negotiable instruments. All the author- "ities agree that even if the warrant be put into a negotiable form "it will not deprive the county of any equity or defense which the "county may have against the person in whose favor the warrant is "drawn. And the better opinion is that the warrant can not be "made negotiable* at all for the reason that it is only intended to "reach money in the county treasury, and the power of issuance "does not imply authority to execute negotiable instruments."

This is the language of the court in case of "Camp vs. Knox county," 3 Lea, Tenn. Rep. 199, upon a question made as to whether or not these warrants bear interest, and the court held that they do not.

In the case of Davidson County vs. Odwill, 4 Lea, Tenn. Rep. 28., the question was presented as to whether or not the County Court of a county could contract for the payment of interest upon county warrants upon a sufficient consideration?

After the rendition of the opinion of Camp vs. Knox County, that the warrants of a county do not bear interest, Davidson county was largely indebted and had a large amount of warrants outstanding and no money in her treasury with which to pay the same, suits were being brought against the county and judgments obtained, when the County Court made an order reciting these facts and agreeing that all parties who would not sue should have interest on their warrants from the date of their registration by the county trustee.

While the court held that the county might agree to pay interest to save costs and obtain time until it could collect taxes enough to pay the warrants—this being a consideration for the payment of interest, yet the court said:

"It is obvious, however, that the County Court cannot, by a general order or resolution make all warrants bear interest in-

definitely. That would be to nullify the decision of this court and the policy of requiring the prompt payment of county debts. Moreover, the power to bind the county for the payment of interest is not *general*, but *special and must be sustained by a consideration.* It is, therefore, limited to the forbearance demanded by the public exigency. * * * * * * The County Court can only contract for the payment of interest on the county debt, in consideration of the creditors' forbearance to sue so long as that forbearance can be held to be for the benefit of the county, and that would only be until there was money in the treasury to pay the warrant in its regular order. Code § 427, sub. sec. 4. After that the liability of the county for interest ceases and the creditor must look to the Trustee and his official sureties, who then become liable for the interest, and the liability may be enforced by motion. Code, § 3613. The law makes ample provision by this section and sections 429 and 430, for the enforcement of the creditors' rights. *Neither the creditor nor the County Court* can charge the county with interest after the money in the treasury, subject to the creditors' call, is ready to meet his demand. The language of the resolution or order of the County Court, so far as it implies more than this in the future, is clearly *ultra vives* and void. The County Court cannot make a contract to pay interest on county warrants beyond the point of time when there is money in the treasury to pay them."

These cases, while not deciding the question presented, are strongly in favor of the position we have taken.

Recuring again to the proposition that the County Court, as the agent of the corporation must act in the mode prescribed by law, there are two other Tennessee cases to which we invite the attention of the court:

1. The case of Colburn vs. Mayor and Aldermen of Chattanooga. Manuscript opinion, a copy of which is herewith submitted, where it is adjudged that, although the charter of the

city of Chattanooga gave the city authorities the right to borrow money for corporation purposes and issue its bonds therefor, yet the city could not issue promissory notes and city scrip for debts. The court says: "They will strictly construe municipal charters and require clear authority for the powers assumed to be exercised under them; that it is the part of true wisdom to keep the corporate wings clipped down to the lawful standard."

2. The other is the case of Barnard vs. Hawkins county. Manuscript opinion, a copy of which is hereto appended.

Hawkins county was authorized, by special statute, to subscribe for stock in the Sneedville and Rogersville Turnpike Company, and the County Court was authorized to issue the bonds of the county for such stock. The county never directed the bonds to be issued or subscribed for the stock, yet (as in case at bar) the Chairman of the County Court did issue the county bonds which were countersigned by the clerk. For several years the coupons for these bonds were received by the tax collectors in payment of taxes, and these were credited on his accounts with the county, and it was insisted that this was a ratification of the original act of the chairman in issuing the bonds, but the court held otherwise, and the county was relieved from paying said bonds.

We, therefore, submit that the County Court of Claiborne county had no authority to issue such a paper as the one in suit; that its act in issuing the same, if in fact it did do so, was *ultra vives* and void, and the holder of said instrument has no cause of action against said county thereon. Hence it follows that his honor's charge to the contrary was erroneous.

Police Jury vs. Britton, 15 Wallace, 566.

(Municipal and Public Sec. pp 171-177

2nd. But should we be mistaken in our view of the first question presented, and if the court should decide that Claiborne county, through its County Court, as an incidental power to that of contracting the debt, had the power to issue this instrument as an evidence thereof, or to direct its chairman to do so, then

we insist, in the second place, that as a matter of fact, said County Court never directed its issuance. The order of the court read in evidence made at the April Term, 1868, is an ordinary order of appropriation, upon which the Chairman of the County Court could issue nothing but a warrant, his act in issuing the bond in suit is clearly and certainly void and has no binding force whatever.

3rd. But it is insisted by counsel for Brooks, and the trial Judge so charged the jury that the order of the court made at the January Term, 1869, is a ratification of the act of the chairman in issuing said bond, to which we reply:

If the court in the first place had no authority to issue the bond, then it could not ratify the act of the chairman in issuing the same.

"A municipal corporation derives all its powers from its charter, and when its charter prescribes the mode in which its contracts shall be made, no contract will bind the corporation unless made in that mode. As a necessary consequence, a contract not made in the prescribed mode cannot be affirmed and ratified in disregard of that mode by any subsequent action of the corporate authorities, and a liability be thereby fastened on the corporation. Ratification is equivalent to a previous authority; it operates upon the contract in the same manner as though the authority to make the contract had existed originally. The power to ratify, therefore, necessarily supposes the power to make the contract in the first instance; and the power to ratify in a given mode, supposes the power to contract in the same way."

20 Cal. 96.
10 Wallace, 676.
16 How. Pr. 432.
9 Baxter, 495.
15 Wallace, 566.

But if payment of coupons cut from bonds issued in such way as not to be binding on the county, as was decided in Barnard vs. Hawkins County, above cites, is not a ratification; then, much the less, will a mere order allowing the officers to pay, by the County Court, made in this case, be a ratification.

But let's examine the order of the County Court, relied on in this case as a ratification of the chairman's action in issuing, and which the trial Judge charged the jury was a ratification.

It provides that the Revenue Collector *be "permitted"* (allowed we presume, not directed) "to examine and investigate the *payment* or transfer of the two bonds, and" (ascertain, we suppose) "whether or not said bonds have been PAID, transferred or assigned to any party for a full and valid consideration before July 7th, 1868, *and if so*" (that is, "*if they have been paid*, transferred or assigned") "he will be allowed" (not directed, mark you) "to pay over what money he may have collected for that purpose."

Now what does this order mean?

It means, if we are to construe it by its language, 1st, that the collector, if upon investigation he finds that said bonds have been transferred or assigned for a valuable consideration, he may pay what money he has on hand on the same, and no more.

It also means, secondly, that, if upon investigation the collector finds that the bonds *have been paid*, then he is to pay, (again we suppose,) what money he has on hand on the same. So this order is nonsensical and unmeaning. It really don't make good nonsense. It could not have been the purpose of the court to direct the collector to pay them if he found, upon investigation, that the same had once been paid, and yet no word can be supplied to make it say anything else—hence we conclude that by no construction can it be held that this order operated as a ratification of the chairman's action.

Claiborne County, in Error,
vs.
W. B. Brooks, Assignee, &c.

BRIEF.

1. The trial Judge erred in charging the jury that County Court of Claiborne county, one of the counties of Tennessee, as an incident to the power to contract a debt had the power to issue commercial paper as an evidence of that contract; and that like an individual it might make and issue commercial paper as evidence of or security for any contract it might lawfully make.

Code of Tennessee, § § 402, 403, 404, 408, 409, 410, 411, 4179, 4180, 4187, 4190, 4215, 4216; 4217, 421; sub secs. 1, 4, 5, 8, 422, 427, sub secs. 3, 4, 429, 431 and 3613.
Cooley's Const. Lim., p 77 and 78.
1 Baxter Tenn. Rep. 60.
20 Cal., 96.
7 Bosw., 601.
20 How. Pr., 396.
Abb. Corp. Digest, 869 and 522.
2 Kans., 357, 371.
16 Ind., 227.
7 Gray, 12.
Cooley on Const. Lim., 196, 215 and note.
2 Swann, 364.
19 Iowa, 209.
3 Lea Tenn. Rep., 199.
4 " " " 28.
Colburn vs. Mayor of Chattanooga, mss. Post p 24
Barnard vs. Hawkins County, mss. " " 21
Police Jury vs. Britton, 15 Wallace, 566, which decides this very question.

Dillon on Municipal Bonds, § 6, p. 12-13 *et seq.*
Wall vs. County of Monroe, 13 Otto, 74.
The Mayor vs. Ray, 19 Wallace, 460. An important case.
Wells vs. Supervisors, 12 Otto, 625.
Daniel on Negotiable Instruments. Vol. 1, § 420, 421, 427; Vol. 2, §1530.

Burroughs on Public Sec pp 171-197
Cannons on Corporate Sec 26-28.
29 La Ann. 678; 6 Nebr 227;
37 N.J.L. 191; 39 N.J.L 394;
45 Ga 323; 2 Cliff 590

2. His Honor, the trial Judge, erred in charging the jury that the County Court could ratify the action of the chairman in issuing the bond in suit; and that the order of January term, 1869 was a ratification.

20 Col., 96.
10 Wal., 676.
16 How. Pr., 432.
9 Baxter, 496.
Barnard vs. Hawkins Co., mss. hereto annexed.

SUPPLEMENT TO ARGUMENT AND BRIEF

—OF—

JESSE L. ROGERS,

IN CASE OF

CLAIBORNE COUNTY, In Error,

VS.

WALTER B. BROOKS, Assignee, &c,

In Supreme Court of the United States.

In reply to the assumption of counsel for defendant in error, that, the Supreme Court of Tennessee, in case of Ross, vs. Anderson county, 8 Baxter, 248, expressly applied the doctrine contended for by defendant in this case to Anderson county," we wish to say:

While we admit that the writer of the opinion in that case employed the language quoted by counsel for defendant in his

brief, yet this language is *dictum* and nothing more, and when that case is examined it will be seen that the question presented in this case did not arise in that case and there was no adjudication of the same, and the clause of said opinion quoted by counsel for defendant is not even persuasive authority on this or any other question.

The case of Ross vs. Anderson county is simply this:

By a statute of Tennessee, known as "The Internal Improvement Act," passed January 22, 1852, Chap. 117, all the counties in Tennessee were authorized to subscribe stock to railroad companys upon certain prescribed conditions and complying with certain requirements. But this act, mark you, did not authorize the issuance of bonds as payments or evidence of the stock subscribed. By an Act passed February 28, 1852, Chap. 191, however, certain named counties in Tennessee were expressly authorized to issue bonds for such stock as they might subscribe to certain railroad companys. At the March term, 1853, of the County Court of Anderson county, the said County Court proceeded to order an election to ascertain the will of the people of the county as to taking $100,000 of the stock of the K. & K. R. R. Co., as provided by the Act of 1852, chap. 117. The vote was had and a decided majority was for the subscription to said stock. Nothing further was done in the matter until the July term, 1854; in the meantime the Legislature had passed the Act of February 18, 1854, Chap. 180, expressly authorizing Anderson county with others to take stock in said railroad and *to issue her bonds therefor.*

Session Acts 1853–4, page 249, Ch. 180.

The second section of said Act reads as follows: "That the Acts of any of said counties in voting stock in railroads, *and to issue county bonds for the same,* not heretofore provided for by law, shall hereby be declared as valid and binding as though said acts had been strictly in accordance with law."

At said July term, 1854, the County Court of Anderson county *subscribed the stock and ordered the bonds to issue therefor.* The bonds were issued dring the years 1856 to 1859 inclusive.

The county paid the interest semi-annually on the bonds for sixteen years without complainant; the railroad was built, and the bonds were negotiated from hand to hand.

Under this state of facts and the statute law, the Supreme Court of Tennessee held, correctly, that all the requirements of the law as to taking the stock and issuing the bonds had been substantially complied with; "that" (to use the language of the court) "there was no question but that the county of Anderson under the statutes above named *had the authority by law*" (not by implication) "to make the subscription *and to issue the bonds in controversy.*"

We submit that the question of the county's implied power to subscribe the stock—create the debt—*and to issue bonds therefor* did not arise.

On the other hand the power not only to create the debt, *but to issue the commercial evidence of that debt were both expressly confered by statute upon Anderson county.*

Session Act of Tenn., 1851–2 Ch. 117 p. 161.
" " " " " " " 191 " 273.
" " " " 1853–4 " 180 " 249.

The title of this last Act is:

"To authorize certain counties to take "stock in railroads," *and to issue the bonds of said counties for the same.*"

I further submit that instead of the case of Ross vs. Anderson county, being authority against the view of plaintiff in error, it taken in connection with the Acts of the Legislatures of Tennessee, above refered to, is strongly in favor of our view of this question.

The Legislature certainly thought there had to be given the counties express power to issue bonds for their railroad stock, or why pass the Act of 1854?

If the power to subscribe the stock and create the debt given by the Act of 1852, Ch. 117, carried with it the implied power to issue negotiable interest-bearing bonds due at a future date, why pass the Acts of 1852, Ch. 191, and of 1854, Ch. 180? The only answer to these questions is that given by this Court

in case of Police Jury vs. Britton, 15 Wallace, 566, and that is that, *independent of such statutes giving counties such express power, they have not the incidental power to make and issue negotiable instruments; which answer is deemed sufficient for* the purposes of this case.

One word further upon the merits. If this action had been brought by the original holder of this paper, under the evidence in this record, he could and would have been defeated in a recovery, upon the defense of the want of consideration; but if the defendant in error succeeds he does so not upon the justness of his demand, but because he holds an unimpeachable paper, possessing all the attributes of negotiability and which cuts off all inquiry into the original consideration.

JESSE L. ROGERS.

Claiborne County, in Error,

vs.

W. B. Brooks, Assignee, &c.

OPINION.

G. W. BARNARD

vs.

HAWKINS COUNTY.

This action was brought to recover the amount of several coupons cut from bonds purporting to have been issued by the County of Hawkins to the Sneedville and Rogersville Turnpike Company. The county denies the execution of the bonds by the proper authority.

The Sneedville and Rogersville Turnpike Company was incorporated by an act, passed the 12th day of December, 1866. By the 4th section of the act, the counties of Hawkins and Hancock were authorized to take stock in the company; and by the 5th section it was enacted, "That for the amount the counties of Hancock and Hawkins may subscribe, the County Courts of said counties may authorize the issuance of county bonds payable at such times as may be directed by the County Courts of said counties."

The bonds read in evidence were made in due form and signed by the Chairman of the County Court and countersigned by the clerk.

The coupons are in the usual form; and that they were actually signed by the clerk and chairman is not denied.

But it does not in fact appear that any subscription was ever made in behalf of the county for stock in said company. The

question was not submitted to a vote of the people as required by the general laws; but aside from this, the County Court made no order authorizing the subscription of stock, or authorizing the issuance of bonds; in fact, took no action in the matter, so far as appears of record on the minute books of said court.

We think there is no principle or sound authority upon which these bonds can be held valid obligations of the county. The people of the county can only act through their officers and agents, but these officers and agents can only bind the county when they act within the sphere defined and established by law. The county was authorized to subscribe the stock, and the County Court to authorize the issuance of the bonds. Yet the county has not subscribed the stock in any mode. No subscription is shown to have been made by any one in behalf of the county. Nor has the County Court, in any manner, authorized the issuance of these bonds. Certainly the chairman and clerk have not the power, of their own volition, to bind the county by these bonds.

But it is argued that the county is now stopped from denying the bonds by reason of the fact that for several years the tax collector received similar coupons for taxes, and the Chairman of the County Court gave him credit therefor in his settlements.

If the Chairman of the County Court had not the power to bind the county in the first instance by the execution of the bonds, we think he could not estop the county by the acts referred to.

We are aware that the recent decision of the Supreme Court of the United States have assumed very strong grounds in favor of enforcing obligations of this character, but we think they have not gone to the extent now claimed. At any rate we cannot go to this extent. In cases of mere irregularities in the exercise of the power, as in the case of Ross vs. Anderson County, we agree that the obligations ought not to be avoided. But here,

we hold, that the county of Hawkins has not acted through the agencies recognized by law as possessing the power to bind the people of the county.

Judgment for the defendant is affirmed.

McFARLAND, J.

State of Tennessee.

I, E. C. Reeves, Clerk of the Supreme Court of said State, for the Eastern Division thereof, at Knoxville, do hereby certify that the foregoing is a full, true and perfect copy of the opinion rendered by said court, in the cause therein named, at its May Term, 1876, as the same appears of record in my office.

Given under my hand and the seal of said court, at office in Knoxville, this, the 22nd day of February, A. D. 1884.

E. C. REEVES, Clerk.

Claiborne County, in Error,
vs.
W. B. Brooks, Assignee, &c.

OPINION.

W. J. COLBURN et als.,
vs.
MAYOR AND ALDERMEN OF CHATTANOOGA.

This bill was filed by complainants in behalf of themselves and other taxpayers of the city of Chattanooga to enjoin the Mayor and Aldermen from issuing any script, treasury warrants, currency notes, bill or other evidence of debt until legal authority is first obtained for so doing. The bill alleges that by an act of the General Assembly of the State, approved on the 20th of March, 1873, entitled "An act to provide for the issuance of bonds by the cities;" it is provided that in no case shall the authorities of cities, having more than 8,000 and less than 20,000 inhabitants, issue any bonds or other evidences of debt until authorized by a two-third vote of the qualified voters of such city at an election held for that purpose, and when duly authorized so to do, by an election held as aforesaid, such authorities are authorized and empowered to issue bonds or evidences of debt not exceeding $150,000, in addition to the debts outstanding at the time of the passage of said act. That Chattanooga contains less than 20,000 inhabitants; that authority has been given by the requisite number of votes, at an election, to issue $100,000 to the Cincinnati Southern Railroad Company; that without any authority by a vote of the qualified voters of said city, said Board of Mayor and Aldermen have, since the

passage of said act of the General Assembly, issued evidences of debt amounting to more than $90,000, and that such evidences of debt consist of warrants on the treasurer, drawn by the Mayor and countersigned by the Recorder. Currency warrants, which are due in one and three years, which are promissory notes, having the form and general appearance of bank bills; that the treasury warrants are payable in city scrip; that by this creation of debt the defendant has greatly depreciated the credit of the city, so much so that said scrip is now bought and sold at from forty to fifty cents on the dollar; that notwithstanding said depreciation, defendants were still issuing large sums of said scrip; that contracts were made payable in cash, but are paid in issues of the city at their cash value, and thus two dollars or more of scrip will be paid for one dollar of indebtedness. That by this means bankruptcy and ruin is being brought upon the tax payers. That defendants be required to answer and state the amount of evidences of indebtedness issued since the passage of the Act of 20th of March, 1873, in what it consists and the character of same, and by what authority issued. The defendants answers after a motion to dismiss for want of jurisdiction of subject matter and parties which was overruled by the court; that the entire funded and floating debt of the city is between one hundred and fifty-four and one hundred and fifty-eight thousand dollars, besides some five thousand or more not audited. That since March 20, 1873, about seventy or eighty thousand dollars of indebtedness has been issued. That they issued the warrants and scrip under the authority and for the purposes specified in the municipal charter and to accomplish the objects of their incorporations and for providing for the payments of the debts and expenses of the city. That upon the coming into office of the present board they found no money in the treasury and a large outstanding indebtedness, and being deprived by the action of the General Assembly of the State at its last session of the power to enforce collection of the taxes for the years 1874-5, they issued warrants

and scrip, believing such a course to be necessary to the maintenance of the city government and for the best interest of the people. That they have the right to issue warrants upon their treasury, whether they have money therein or not, and the right to issue scrip. That the credit of the city is depreciated but not by any illegal creation of debts, but by the action of the last Legislature suspending the collection of taxes. That in one transaction they paid $3,304.83 in scrip, ranging at the rate of from 50 to 75 cents on the dollar. At another time they paid $559.96 in scrip at from 60 to 75 cents; at another time $2,500 at 60 cents, at another $1,443.20 at 50 cents on the dollar, and $1,300 was paid at 62 or 63 cents, and some few other payments at from 45 to 60 cents were made. That warrants on the treasury are paid in city scrip, bearing ten per cent. interest, if holders desire it. That warrants were issued payable in city scrip. That the scrip was not issued to circulate as currency. That the form of scrip is:

"STATE OF TENNESSEE.

(1)

One year after date, The Board of Mayor and Aldermen of the city of Chattanooga will pay one dollar to bearer.

THOMAS TAYLOR,
Auditor Mayor,"

and endorsed: "This warrant is receivable for all taxes and other dues of the city on presentation."

That there are now outstanding:

Warrants on Treasurer	$41,183 23
Ten per cent. scrip	26,278 89
One-year scrip	8,381 00
Three-year scrip	21,771 00
Three years interest on ten per cent. scrip	7,450 42

That $100,000 in bonds have been voted to the Cincinnati Railroad Company, but the same is not yet issued. That they have been governed by a conscientious desire to discharge their

Claiborne County, in Error,
vs.
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duty, and that no expense has been incurred or evidence of indebtedness issued but that which they believed to be necessary for the good order, government and improvement of the city and such as is contemplated in the charter under which they acted. It is admitted that Chattanooga contains a population of less than twenty thousand. The cause was heard upon the bill, answer and exhibits and injunction granted and defendants have appealed to this court.

The first question presented by the case for our determination is the Chancery Court jurisdiction of the subject and of the municipal conduct of the defendant by bill filed by a tax payer. It is insisted for the defendants that illegal acts, such as defendants are charged with, effect the whole public and the public must by its authorized officers institute the proceeding to prevent or redress the illegal act, and therefore, the Attorney General was the proper officer to file this bill; and we are referred to the reports of several States, thus holding. The better and more universal doctrine is, that any tax payer may bring his bill in equity to prevent the corporate authorities from acting *ultra veres*, when the effect will be to impose upon him an unlawful tax or to increase his burden of taxation. 2 Dillon on Municipal Corporations, sec. 731, says: "In this country, the right of *property holders* or *taxable inhabitants* to resort to restrain municipal corporations and their officers from transacting their lawful powers or violating their legal duties in any mode which will injuriously effect the tax payers, such as making an unauthorized appropriation of the corporate funds, or of an illegal disposition of the corporate property, or levying or collecting void and illegal taxes and assessments upon real property * * has been affirmed or recognized in numerous cases in many of the States. It is the prevailing doctrine on this subject. It can, perhaps, be vindicated upon principle, in view of the nature of the powers exercised by municipal corporations and the necessity of afford-

ing easy, direct and adequate preventive relief against their abuse. It is better that those immediately affected by corporate abuses should be armed with the power to interefere directly in their own names, than to compel them to rely upon the action of a distant State officer." The action of the Chancellor therefore in overruling the motion to dismiss the bill, for want of jurisdiction, was proper. The charter of the corporation of Chattanooga provides that the corporation "shall have full power to borrow money on its bonds for any object that its authorities may determine to be important to the production of its welfare and that is not made improper by existing law, *provided*, that the sum borrowed under the provisions of this section, shall not exceed the sum of fifty thousand dollars, without being specially authorized so to do by a majority of the qualified voters of said city." The unconstitutionality of the act of March 20, 1872, has been argued with great earnestness, because the caption of the act does not state the subject of the act, and because it repeals the section first quoted from the charter of incorporation of the city of Chattanooga. In the view we have taken of this cause it is immaterial whether said act is constitutional or unconstitutional, or whether it repeals any part of the charter or not, neither by the act of March 20, 1873, nor by the charter has the corporation any power or authority to issue warrants on the Treasurer or City Scrip for the purpose of raising money for the ordinary expenses of the corporation.

Warrants on the Treasurer may be given by an authorized officer to pay money, but only as evidences to him that the debts had been audited by the properly authorized officer of the body and serve as voucher to him for his disbursements, Mayor and City Council of Nashville, and J. G. Fisher, et al. Nashville, 1875. If there be not money in the Treasury then the corporation should borrow as provided in the charter or by existing law or they should levy and collect such tax as to raise whatever sum is needed, and if they can neither borrow or raise the money by

Claiborne County, in Error,

vs.

W. B. Brooks, Assignee &c.

taxation to meet their expenditures then they should cease their expenditures until they can thus realize according to law. But for no purpose had the corporate authorities the right to issue warrants on the Treasury payable in city scrip or to issue the City Scrip. Their action was illegal and contrary to law and public policy. This city scrip is about the size, and upon the same kind of paper, and in every respect very much like National Bank Notes, and was doubtless designed to circulate as currency.

The court will strictly construe mnnicipal charters and require clear authority for the powers assumed to be exercised under them. While these defendants aver that they have acted in the utmost good faith, yet, so much abuse of power, not to say corruption, has been found in some municipalities, and such ruinous burdens placed upon the tax payers, that to use the language of a distinguished author, "it is the part of true wisdom to keep the corporate wings clipped down to the lawful standard."

Let the decree be modified as indicated in this opinion and the injunction be made perpetual.

LEA, Judge.

State of Tennessee.

I. E. C. Reeves, Clerk of the Supreme Court of said State for the Eastern Division thereof at Knoxville, do hereby certify that the foregoing is a full, true and perfect copy of the opinion rendered by said court, in the cause therein named, at its May Term, 1876, as the same appears of record in my office.

Given under my hand and the seal of said court at office in Knoxville, this the 22nd day of February, A. D., 1884.

E. C. REEVES, Clerk

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111-400

SUPREME COURT U.S.
FILED
MAR 26 1884
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

Writ of Error to the Circuit Court of the Eastern District of Tennessee, at Knoxville.

Claiborne County in Error,

versus

WALTER B. BROOKS, ASSIGNEE, &c.,

DEFENDANT.

Brief Filed

BY JAMES G. ROSE,

Counsel for Defendant-in-Error Brooks.

Claiborne County in Error

vs.

Walter B. Brooks, Assignee, etc.

BRIEF OF DEFENDANT BROOKS.

This is a writ of error brought by Claiborne county, Tennessee, to reverse a judgment of the United States Circuit Court, at Knoxville, against said county in favor of defendant for $8,741 00 and costs. It was an action at law upon a paper writing purporting to be the bond of the county, payable to V. H. Sturm or order, and by him endorsed to Howard, Cole & Co.—the defendant in error suing as their assignee in bankruptcy.

The issues joined between the parties were on pleas of *non est factum*, *nil debit* and payment. The jury found these issues, and the facts therein involved, in favor of the derendant in error. Hence, the verdict establishes these facts, viz: that Claiborne county made (or ratified) the bond sued on; that it owed the debt represented by the bond; and that it was not paid.

The facts as set out in the bill of exceptions and found by the jury, are as follows:

1. That Claiborne county, by its County Court, ap-

pointed commissioners who contracted with V. H. Sturm for the erection of a court house in Tazewell, the county seat, at the price of $8,000 00 for the work and material;

2. That by the authority of the County Court, the commissioners modified the original contract with Sturm, so as to enlarge the building without fixing the additional price to be paid for the modifications in the original plan;

3. That, at the April term, 1868, of said County Court, an order was made by said court in these words: "Ordered by the Court, that V. H. Sturm be allowed Ten Thousand Dollars in part pay for the Court House;"

4. That the bond sued on was made and delivered to said Sturm by the chairman of said county court, together with another bond of like amount, to cover said appropriation of $10,000 00, and that the other bond (not in suit) had been paid;

5. That, at the January term, 1869, of the said county court, the following additional order was made: "It was this day ordered by the court that Benjamin Ausmus, revenue collector of Claiborne county, be permitted to exumine and investigate the payment or transfer of *certain county bonds issued in favor of V. H. Sturm*, and whether or not said bonds have been paid, transferred or assigned to any party for a full and valid consideration before the 7th July, 1868; and if so, said Ausmus, as revenue collector, be allowed to pay over or deposit whatever fund he may have on hand collected for that purpose to the person or persons holding the lawful possession of said bonds."

Such being the evidence before the jury, on which they found their verdict in part, it only remains to be determined whether his Honor's charge as applicable

to the evidence, was correct; and this involves the question, first, whether in point of fact the county made or ratified the bond sued on, and secondly, whether in point of law the county could make such a bond at all. The errors assigned as set out in the bill of exceptions involve these questions only.

I.

Upon the first question above stated the trial Judge was requested to say to the jury that "the chairman of the county court had no right to make or issue the bond, and the payment of a similar bond by the county would not operate as a ratification of this bond, or make it valid." The court did instruct the jury fhat the chairman of the county court had no authority, *as such*, to make the bond, but that if made and issued by him without authority from the court, it might be ratified by the county court, so as to make it valid as the bond of the county.

In other words, the court charged that the authority that could make the bond in the first instance (the county court) could ratify the unauthorized making of it. This was not error. 6 Otto, 687; 1 Dill. Muc. Corp. §385–6; Dan. Neg. Insts., §1545 et seq; Supervisors *vs.* Schenck, 5 Wall, 581.

The court did not directly respond to the proposition "that the payment of a similar bond by the county would not operate as a ratification of the bond sued on, or make it valid." If the court had charged this proposition it would under the evidence have misled the jury. The proposition assumed but one circumstance, and that was the most trivial one in evidence, tending to prove the fact of ratification. If no other fact or circumstance had been put in evidence, except the one assumed in the proposition, it

would perhaps be correct. But a proposition, correct in the abstract, may be erroneous and misleading in its application to a particular case; and, if so, the court should refuse to charge it, as his Honor did in this case. To put the court in error upon a question of this character, the proposition submitted should have fairly and substantially embodied the facts and circumstances in evidence bearing on the question; but instead of doing this, the proposition submitted ignored the existence of all the facts and circumstances tending to prove ratification, but one trivial circumstance, and the court was requested to instruct the jury that *that one* was not sufficient. The court was not bound to respond to such an unfair and one sided proposition. The proposition utterly ignored the order of the county court at its January term, 1869, above set out. It will be shown in its proper place that, under the laws of Tennessee, the county court at its quarterly sessions (and the January term, 1869,) had full power and authority in law, a majority of the justices being present, to bind the county either in making or ratifying the bond in suit. This county court order of January term, 1869, made nine months after the bonds had been issued, in express words recognizes the bonds issued and delivered to Sturm "as certain county bonds issued in favor of V. H. Sturm"—directs the revenue officer of the county to ascertain who are the lawful holders of the bonds and to pay them off out of the money in his hands collected for that purpose. The other evidence shows that there were two bonds issued to Sturm, each for $5,000 00, and that one was paid (presumably) under this order, and that the other is the one in suit. It also shows that money had been collected by the proper revenue collector of the county, by taxation

manifestly, for the purpose of paying the bonds issued to Sturm, and of which the bond in suit is confessedly one of them.

Here, then, was a volume of evidence before the jury, not only of matter in *pais*, but record evidence of the most conclusive character, all tending to prove the fact of ratification by the proper authority, which well warranted his Honor in refusing to charge upon one isolated circumstance as requested, and in charging as he did. The county court order of January term, 1869, was a full and complete ratification of the act of the chairman in issuing the bonds. Where the officers of a corporation exercise powers which presuppose a delegated authority for the purpose (as did the chairman in this case) and other corporate acts subsequently performed show that the corporation must have contemplated the legal existence of such authority, *the acts of such officers will be deemed rightful, and the delegated authority will be presumed.* The county court order of January term, 1869, comes directly within this principle. Supervisors *vs.* Schenck, 5 Wall, 781.

II.

The second question involved in the charge is one of law, viz: Could the county make or ratify the bond in suit in point of law? Or, was the making or ratification of the bond, as evidence of part of the court house debt, an act *ultra vires* and void? Upon the trial the county requested the court to charge the jury, "that in the absence of express power conferred by statute, the county of Claiborne, as a corporation, had no power to make and issue a negotiable interest bearing bond, such as the one sued on—there being no implied power to issue such a bond," and that, as a consequence of such want of power, the

bond was void and incapable of ratification. If the premises were correct then we would admit the conclusion. But the fallacy of the proposition consists in the failure to discriminate between the power to create a debt and the power to make and deliver the commercial evidence of it. The latter is incidental to the former; the bond in this case did not create the debt, it was only evidence of it. The real question is, did the county as a corporation have the power in law to contract the debt which this bond in part evidences? His Honor, refusing to charge as requested, correctly, as we think, instructed the jury—

"That the defendant, Claiborne county, a corporation under "the laws of Tennessee, through the county court, was auth- "orized to erect a court house; that the power to erect im- "plied the power to contract for the same; and that the coun- "ty had the incidental or implied power to execute a note, "bond or other negotiable security in payment of such con- "tract." * * * "That a corporation, with power to make "a contract, like an individual, might make and issue com- "mercial paper as evidence of, or security for, the contract."

We submit that the charge of the court is strictly correct.

The question is: Did Claiborne county have power under the laws of Tennessee, through her quarterly county court, to contract a valid debt for erecting a court house at her county seat? The Code of Tennessee provides—

§402. "Every county is a corporation, and the justices in the county court assembled are the representatives of the county and authorized to act for it."

§403. "Suits may be maintained against a county for any just claim as against other corporations."

§404. "Each county may acquire and hold property for county purposes, and make all contracts necessary or expedi-

ent for the management, control and improvement thereof, and for the better exercise of its civil and political power; may do such other acts and exercise such other powers as may be allowed by law."

§408. "It is the duty of the county court to erect a court house, jail and other necessary county buildings."

§410. Such buildings "shall be erected within the limits of the county town."

§411. "The county buildings are to be erected and kept in order and repair at the expense of the county, under the direction of the county court, and it may levy a special tax for that purpose."

§415. "The said justices shall appoint not less than three nor more than five commissioners, a majority of whom shall be competent—

To make such sale and purchase;

To contract for and superintend the erection of the new jail and court house; and

To carry into execution all such orders as said justices may deem necessary and proper in the premises."

It is (or rather was) insisted that Claiborne county could not create a valid debt under the foregoing sections of the Code for the building of a court house; that section 411, above quoted, restricted her powers to the mere levying a special tax for that purpose. The power to levy a special tax in section 411 is in no sense restrictive; it was not thereby intended to limit the county to that particular mode of procedure before the court house could be built. That construction would require that the court house money should be raised by special taxation before it sould be let to contract. The language of the act—"may levy a special tax," etc.—certainly does not require a construction that would so hamper the counties in the exercise of their civil and political powers, and work such a great inconvenience to the citizens.

But the power of the county court to make contracts for the erection and repair of the court house is expressly conferred by said sections 404 and 415.

The sections quoted must all be construed together. They confer on Claiborne county certain corporate power; limited power it certainly is, yet sufficient to enable her to exercise her civil and political duties as a county. The section 403 provides that the county may be sued "for any just claim" as other corporations. Why such provision of the statute, if the county could not create a just claim? The fact that the law provides for suit against the county on a just claim, *demonstrates* that such claim may exist, and certainly a debt contracted for building a court house would be a "just claim"—being for a strictly county purpose under the law.

Under §404 of the Code quoted, the county could, for county purposes "acquire" and hold property and make "contracts" for its improvement. The right to acquire necessarily includes the right to purchase as a means of acquisition; and the right to contract for improvements necessary for the exercise of its civil and political powers includes the right to create debts for such improvements, such as the building of a court house. It was the duty of the county, under the law, to erect a court house, and to create debts for that purpose if necessary. In the discharge of this duty the "Justices in the county court assembled are the representatives of the county and authorized to act for it," and also to "make all contracts necessary or expedient" for the discharge of the duty. Section 411 of the Code quoted, conferring on the county court the power to levy a special tax for the purpose of erecting and repairing county buildings, is a cumulative provision, designating the

mode of raising the money necessary to discharge the just debts and obligations of the county incurred by contract or otherwise for the erection and repair of such buildings. It simply confers on the county court the power to levy a "special tax" for the particular purpose of erecting and repairing county buildings, which would be of rare occurrence, as contradistinguished from the power to levy taxes for the ordinary county purposes.

The adjudications of the Supreme Court of Tennessee, in the construction of these sections of the Code of Tennessee, fully sustain the foregoing views. In the case of Wood vs Tipton county, 7 Baxter, (Tenn.) 112, that court held as follows: "Each county is declared by statute to be a corporation and the Justices of the county court are the representatives of the county and authorized to act for it. The county court, within the powers prescribed by the constitution and laws, is the legislature for the people of the county, and bears a relation to the people of the county analagous to that which the General Assembly bears to the people of the State. Within their prescribed spheres the county courts legislate for the public good in laying out roads, and other local improvements as are for the public benefit and authorized by law. The county is declared a corporation to facilitate the execution of the powers delegated to it as a local legislature, *and to enable it to make binding contracts and to be liable to suit for just claims arising under such contracts.* But this is the extent to which, as corporations, counties can be sued. Wood vs. Tipton county, 7 Baxter, (Tenn.) 112; Carey vs. Campbell county, 5 Sneed, (Tenn.) 514; Davidson county vs. Alwell, 4 Lea, (Tenn.) 31; Camp vs. Knox county, 3 Lea, (Tenn.) 199.

Assuming, then, that Claiborne county, under the laws of Tennessee, had the power to contract a valid and binding debt for building a court house at the county seat—the further question arises—Did the county have the power in law to make (or ratify) the bond sued on as evidence of this valid court house debt. In other words, assuming this court house debt to be valid and within the power of the county as a corporation to contract, would the making (or ratification) of a bond, like the one in suit, as evidence of the debt, be *ultra vires* and void? The power of the county to make the bond is denied. We maintain that the county, under the laws of Tennessee (which must govern this question) could do so, not because any statute says it may issue bonds to evidence a just claim, but because the power to contract a valid debt necessarily carries with it the incidental or implied power to make and deliver the evidence of the debt, which in the absence of statutory prohibition may be any paper known to commercial usages

This doctrine of implied power to create the commercial evidences of a debt that the corporation may lawfully contract, in its application to private trading coporations, cannot be doubted. It is too well settled to require the citation of authorities to support it. But the doctrine is not confined to private corporations; it has been applied to Municipal Corporations proper in numerous cases both in the State and Federal Courts. 1 Wall, 372; 84 Penn. st., 500; 41 Penn. st., 278; 1 Wall, 387; 3 Wall, 654; 15 Ind., 395; 18 Grat, 338; 34 Penn. st., 496; 48 Ill., 423; 37 Penn. st., 241; 11 Wisc., 470; 7 Ohio, 31 and 358; 16 Wall, 12; 7 Wisc., 688; 7 Heisk., (Tenn.) 288; 2 Cold., (Tenn.) 660.

Although it is well settled that private and municipal corporations proper, having the power to create a debt, have also the implied power to execute the commercial evidences of it, yet it is urged that this rule does not apply to counties, because they are only *quasi* corporations and can do nothing without express law, and his Honor was so requested to charge the jury. We maintain that the supposed distinction, if it exist in any case (which we deny) does not apply to the counties of Tennessee. The counties in Tennessee are not simply *quasi* corporations, but *actual* corporations, created such by express law, having well defined powers and duties. In this particular they do not differ from municipal corporations. What is a *quasi* corporation? It is a county or local subdivision of a county, not incorporated by express statute, but which the courts hold to be *quasi* or constructive corporations. This is sometimes necessary to enable them to perform their civil and political duties, and to prevent a failure of justice. But counties and incorporated towns in Tennessee are alike public corporations created by law for purposes of local police and government. The only real distinction between counties and incorporated towns in Tennessee, is, that the latter usually have conferred upon them a greater number of powers. They differ, not so much in the nature of the powers conferred, as in the number and extent of them. So far, however, as powers are actually conferred upon a county by a statute incorporating it, there is no reason for denying to the county such implied powers as would be conceded to a municipal corporation in like case. Dan. Neg. Inst., vol. 2, §§1527—1532.

The Supreme Court of Tennessee, in the case of Ross vs. Anderson county, (8 Baxter, 248,) express-

ly applied the doctrine for which we contend in this case, to the county of Anderson. That was a case in which Anderson county had voted to take stock in a railroad under certain acts of the General Assembly. The county issued bonds in payment of the stock voted, and then resisted the payment of the bonds (or rather the coupons) on the grounds that the statutes did not authorize the issuance of bonds. The Supreme Court of Tennessee, in that case, use this language: "The K. & K. railroad company was chartered in 1852, and was a railroad in which the county of Anderson might lawfully take stock under the act of 1852, ch. 117. But this act of 1852, ch. 117, did not authorize bonds to be issued. We take it to be a sound principle, however, that a county, like another corporation, having a right to create a debt, has also the incidental right to issue the commercial evidences of it in such form as may be satisfactory to the parties." Accordingly, the county of Anderson was held liable upon the principle for which we contend in this case.

We confidently submit the following propositions as being sound, both upon principle and authority:

1. That if a municipal corporation proper, or an incorporated county, be empowered by law to erect public buildings for public purposes, such as markets, court houses, etc., it must necessarily contract debts for the labor and material required to carry out the expressed power, and the implied power would clearly be the same in both classes of corporations. Lynde vs. County, 16 Wall, 12; Mills vs. Gleason, 11 Wisc., 470; Bank vs. Chilicothe, 7 Ohio, part 2, 31.

2. That if such corporations have the power to

contract a debt for a corporation purpose, they have the implied power to b rrow money to pay the debt, and to issue bonds for the money borrowed. The three cases above cited sustain this proposition fully, and the case of Lynde vs. County, 16 Wall, 12, was a court house case which in its facts goes far beyond the case at bar. In that case, where the county was authorized by statute to construct a court house and levy a tax for that purpose (very much like the sections of the Code of Tennessee quoted,) it was held by this court that the proper officer of the county had the *implied* power to borrow money, and to issue negotiable bonds therefor, and to sell them. In the case at bar it is not necessary to push the doctrine of implied power so far. Here no money was borrowed and no bonds sold, but the debt was contracted by lawfu' authority for a lawful purpose, and the bonds issued directly to the contractor who built the court house as evidence of the debt which the county court has twice acknowledged of record the county owed him. See also the following: De Voss vs. City of Richmond, 18 Gratt., 338; Railroad vs. Evansville, 15 Ind., 395; Cone vs. Pittsburg, 34 Penn. St., 496; Middleton vs. Allegheny Co., 37 Penn. St., 241; Reinbath vs. Pittsburg, 41 Penn. St., 278.

Assuming, then, that Claiborne county had the power in law to contract a valid debt for building a court house, and the implied power to issue the bond in suit as evidence of such debt, how and by whom is this power to be exercised? The Code of Tennessee provides:

§402. (Above quoted:) "The justices in the county court assembled are the representatives of the county, and authorized to act for it."

§4179. "The county court consists of the justices of the county, and is held monthly on the first Monday of each month for the transaction of business, &c"

§4180. "It is divided into a quarterly and quorum court; the first being held by all or any number of the justices necessary to transact business, the latter by any three or more of the justices."

§4181. "All business in the county court required to be done by more than three justices of the peace, shall be done at the quarterly sessions, to be held on the first Mondays of January, April, July and October of each year; and it is the duty of all the justices to attend at these sessions."

§4182. "The justices of each county at the first term of every year, shall appoint three of their body to hold the county court on the first Monday of every month, the quarterly court taking precedence when in session."

§4187. "The justices of the peace of said court, a majority being present, at their first term in every year (except in counties where a county judge is provided for) shall elect a chairman who presides over the deliberations of the court, &c."

§4190. "A majority of all the magistrates (justices) of the county is required to levy a tax, or to appropriate public money to an amount over fifty dollars."

§4195. "In making appropriations of money, the vote of the justices present shall be taken by ayes and noes, the clerk calling and recording the name of each justice, together with his vote aye or no as it is given, which shall be entered on the minutes, together with the items of allowance." (The Supreme Court of Tennessee in constructing this section of the Code hold it to be directory only, and that a failure to record the ayes and noes would not vitiate the appropriation—so held in this identical case. See Brooks vs. Claiborne county, 8 Baxter, (Tenn.) 43.

§4215. "The county court may appropriate money as follows:"

Sub. sec. 12. "For building, repairing and taking care of court-houses, jails and other county buildings."

The above are all the sections of the Code of Tennessee material to the question. Under these sections of the Code, particularly section 4190, we concede that the authority necessary to bind the county in making the appropriation of $10,000 00 to Sturm, and the making or ratifying the bond sued on, was the quarterly county court composed of a majority of all the justices of the county. In construing that section of the Code, the Supreme Court of Tennessee in the last case decided, (in 1878) say, "that section 4190 does not say or mean that a majority of all the justices of the county are required to vote affirmatively for the proposition to levy a tax (that being a tax case) but that it means that a majority of the justices is necessary to constitute a court, having the power to levy the tax, and that a majority of the court thus empowered to levy the tax, may lawfully levy it."

Steel vs. Blanton, 1 Lea, (Tenn.,) 514, overruling on this point. 8 Baxter, (Tenn.,) 43. And we do not doubt that this court, if it deems the question material, will follow the ruling of the Supreme Court of Tennessee, in the construction of this Tennessee statute, not only because it is the last ruling of that court on the subject, but because of its manifest correctness.

We respectfully submit, however, that no question arises on the record in this court, except the following:

1. The power of Claiborne county under the laws of Tennessee to contract a valid debt for building a court house.

2. The power of the county to execute (or ratify the execution of) the bond sued on as incidental to its power to contract the debt and as evidence of it.

The bill of exceptions, if it can be treated as an assignment of errors under the Revised Statutes, §997, raises no other questions. The parts of his Honor's charge, set out in the bill of exceptions, relate to these questions only. The entire evidence is not set out in the bill of exceptions, but only so much thereof as will raise the above questions and show the pertinency of the charge of the court. His Honor, in the charge, used the words "county court," stating in substance that the county court could bind the county in making the contract to build the court house and in ratifying the bond issued as evidence of it—but did not state that the county court having this power was the quarterly (and not the monthly) sessions of the court, composed of a majority of the justices of the county. But this language of his Honor was used with reference to the evidence before the jury and on which they were to act. That evidence, so far as set out in the bill of exceptions, was the county court order of April term, 1868, and of January term, 1869- and the record of both these terms shows that twenty justices of the peace were present and held those courts. These were quarterly terms. See Code (Tenn.) §4181. That is fixed by law. But whether a majority of the justices were present, is a question of fact, and the bill of exceptions does not set out this evidence on this question, except to show that twenty justices "began and held" those terms of the court respectively. It does not pretend to set out all the evidence, and the third plea of the county to the original declaration admits that there were only twenty-five justices in the county. The twenty-five

justices present at the term in question constituted a majority of the whole number; but we insist that as no exception was taken or instructions asked in relation to the number of justices necessary to act in the premises, so as to bind the county, the question does not arise on the record in this court. From all that appears in this record the question was not controverted in the court below, and to put the court in error his attention should have been called to the question and specific instructions asked raising the question, and exceptions duly taken.

But if this question can be considered on this writ of error, at all, we submit the following as conclusive of it, protesting, however, that the record does not raise it:

1. The record of the county court at April term, 1868, and January term, 1869, show that twenty justices of Claiborne county "began and held" those courts respectively; these were quarterly terms under the law; and the county's third plea admits that there were only twenty-five justices in the county. Hence, the twenty present when the orders in question were made, constituted a majority of the whole, and had power to act for and bind the county.

2. The justices of the court must of necessity take judicial cognizance of the number and persons constituting the court, and when twenty justices at a quarterly term of the court, take action upon a matter requiring the presence of a majority of them to act, the presumption would be that the twenty constituted a majority until the contrary appeared—especially as the court was one of general, original and superior jurisdiction over the subject matter in question. Obion county vs. Marr, 8 Humph., (Tenn.,) 634; Cary vs. Campbell county, 5 Sneed, (Tenn.,)

514; Brien vs. Hart, 6 Humph., (Tenn.,) 130; 3 Baxter, (Tenn.,) 262; 8 Baxter, (Tenn.,) 218; 1 Lea, 514; 9 Yerg., 305; Smith's Lead Cases, vol. 1, page 1095; 8 Howard, 566; 2 Howard, 43 and 319

Where a corporation has the power in law to issue a negotiable bond (as we think Claiborne county had in this case) the *bona fide* holder had the right to presume that the bond was issued under the circumstances, and for the purpose, which give the requisite authority, and it can not be impeached in his hands. Supervisors vs. Schenck, 5 Wall. 784; Gelpcke vs. Dubuke, 1 Wall, 203; Lexington vs. Butler, 14 Wall, 296; Henry co. vs. Nicolay, 5 Otto, 626.

There are no merits, legal, equitable or moral on the part of the county in this case. Without complaint as to the performance of Sturm's work or the materials used; after accepting the court house and using the same as a temple of justice; after making an appropriation of $10,000 to pay him in part for his work; after ratifying the two bonds issued to cover that appropriation, and actually paying one of them—the county now resists the payment of this bond upon the merest techinal quibble. This case has been in the various courts, State and national, for about twelve years, during which the defendant in error has been kept out of his just dues. It has been to him, indeed, a case of justice long deferred. The county having long resisted the payment of this just debt, without even a moral defense to stand on, it is manifest this writ of error is prosecuted for delay. We do, therefore, insist that it is a proper case for the affirmance of the judgment of the court below, with interest, costs and damages at ten per centum on the amount of the judgment according to Rule 23 of this court.

JAMES G. ROSE,

Counsel for Defendant in Error.

The cases cited and relied on by counsel for plaintiff in error do not bear upon the direct question involved in this case. They are cases to the effect that commissioners, trustees, or other representative officers of a county or parish, invested with the usual powers of administration in such cases, have no implied power to issue negotiable securities of a character to be unimpeachable in the hands of innocent holders.

Such is the case of Police Jury *vs.* Britton, 15 Wall, 570. That is not a case in which a specific evidence of debt, like the one in suit, was executed as evidence of the county's liability on a specific contract; but, on the contrary, it is a case where the parish officers, with no authority except their general administrative powers as such, issued 460 coupon bonds of $100 each. While this court held the bonds and coupons void, in that case, the opinion of the court uses this language: "That a municipal corporation, which is expressly authorized to make expenditures for certain purposes, may, unless prohibited by law, make contracts for the accomplishment of the authorized purposes, and thereby incur indebtedness and issue proper vouchers therefor, is not disputed." Such is the case at bar. We do not insist that the Justices of Claiborne county, under their general authority to act for the county, had the implied power to issue a lot of coupon bonds or other negotiable securities, but that such Justices, having the express power to contract a valid debt for a specific county purpose, they also had the implied power to furnish some evidence of the debt and contract, and that in the absence of prohibitory legislation the evidence may assume the form of the bond in suit.

So the case of The Mayor *vs.* Ray, 19 Wall, 468, relied on by counsel for plaintiff in error, simply holds that city warrants, orders, checks or drafts, drawn by the auditing officer of a city upon the treasurer, are not commercial paper in the sense of creating an absolute obligation to pay free from legal and equitable defenses. That case relates to the commercial qualities of the paper that a municipal corporation may issue —denying to such paper the usual incidents of negotiable paper—unless authorized by legislative authority. That case does not deny to the corporation the power to make an ordi-

nary common law bond, such as the one based on, as evidence of a particular debt it has lawful power to contract.

So the Tennessee case of Colburn *vs.* M. & A., of Chattanooga, is wholly different from this case. In that case the city authorities issued a large amount of city scrip, about the size and having the appearance of bank notes and evidently intended to circulate as money. The court so found the facts as appears on the face of the opinion quoted at length in the printed brief of plaintiff in error. It needs no argument to show that that case has no application to the case at bar.

Upon the general subject of the implied power of a city or county to borrow money and execute bonds and other evidences of debt, as incident to the express power to create a debt, see the following:

Burroughs on Pub. Sec., p. 173, *et seq.*
Tucker *vs.* Raleigh, 75 N. C., 267.
Ketchum *vs.* City of Buffalo, 14 N. Y., 356.
City of Williamsport *vs.* Commonwealth, 84 Penn. St. 5.
City of Galena *vs.* Corwith, 48 Ill., 423.

ADDENDA.

In the printed argument read for plaintiff in error in this court, it is conceded that the laws of Tennessee confer upon the counties of that State, acting through the county courts, "express authority to erect a court house" and also "to contract a debt for that purpose." After making this concession, however, it is argued that the laws of Tennessee designate in express terms "the mode in which this power is to be exercised and the character and kind of paper that the county court, through its chairman, may issue as a means of payment and *as evidence of such indebtedness.*" This last proposition is wholly untenable. The statutes of Tennessee on which counsel for plaintiff in error relies, do not in express terms or by implication, designate the mode in which the contract for building a court house shall be made, nor how that contract shall be evidenced. There is absolutely nothing in these statutes restrictive or prohibitory either as to the mode of making the contract or as to the character of the evidence that may be executed to witness the contract. The statutes are absolutely silent on these subjects.

The proposition urged in this court is, that the provisions of the Code of Tennessee in relation to county warrants, operate as a statutory prohibition on the county in the execution of the bond in suit, and render it *ultra vires.* We maintain that this is a total misapplication of the statutes in question. They do provide (Code, §§ 422 and 4217) that—"No money shall be drawn out of the county treasury except upon a county warrant signed by the chairman of the county court, or by the county judge where provided for." This provision of the Code is the authority for issuing county warrants, and the proposition is, that while the county may lawfully contract a valid debt for building

a court house, it can only issue a county warrant as evidence of it.

To this we reply as follows: The sections of the Code of Tennessee in question simply prescribe the mode of drawing money out of the county treasury; they are intended merely to regulate the fiscal transactions of the county and its financial officers. A county warrant is not a paper creating a county debt, or evidencing such a debt; it is only an order drawn by the chairman of the county court, who is "the accounting officer and general agent of the county" (Code, §421,) upon the county Trustee who is the treasurer of the county for the payment of money out of the county treasury. The warrant is simply the Trustee's authority to pay, and his voucher for the payment. So far, therefore, from a county warrant being necessary to create a county debt, or the only statutory evidence of it, it is simply a mode of paying the debt. The sections of the Code of Tennessee relied on by counsel for plaintiff in error, are provisions looking to the discharge of county debts and liabilities, and not to the creation of them or the evidence of them. These statutes furnish certain checks and limitations on the accounting and disbursing officers of the county.

The county warrant is a part of the statutory machinery to reach the money of the county in its treasury and apply it in payment of the county debt. It is a proceeding subsequent to the creation of the debt and its evidence, and even subsequent to suit and judgment against the county. No execution can run against the county in Tennessee as its property is held in trust for public and governmental purposes; the creditors of the county can only reach the money in its treasury through the instrumentality of a county

warrant. And this county warrant is necessary whether the claim is litigated or unlitigated; it is even necessary after judgment is rendered on the claim. In this sense it is simply a statutory mode of execution, and has no relation whatever to the creation of the debt or to the evidence of it. To illustrate this more fully. Let it be supposed that our judgment in this case is affirmed by this court. What is our next procedure to realize? If a special tax were levied, collected and in the county treasury to pay the judgment, defendant in error Brooks could only reach it through a county warrant, and he might have to resort to a *mandamus* to compel its issuance. We have not yet reached the point where a county warrant is essential in this case. Such warrant is a necessary step in the remedial proceedings we must resort to in case this judgment is affirmed; but it has no connection with the debt, its mode of creation or the evidence of it.

Again: As above stated, counsel for plaintiff in error concedes that the county could contract a valid debt for the erection of a court house, but denies that it could make or ratify the bond in suit as evidence of this debt. The concession is fatal to his position. Because, it is clear, that under the laws of Tennessee the county court is the governing authority and vested with the contracting power of the county in relation to building a court house. This is not and cannot be denied. The power to contract in such case, so as to bind the county, *necessarily* carried with it the power to furnish some evidence of the contract; the power that can make the contract must be competent to create the evidence of it in some form or other; in fact it is impossible to conceive of a debt existing by contract without some evidence to support it; and the creation of the debt necessarily creates the evidence to support

it. Whatever authority, therefore, that can create the debt, must be able to furnish the evidence of it—otherwise the contracting power would be wholly nugatory. Hence, it cannot be a sound construction of the statutes in question to hold that county warrants are the only evidence of the county's liability; that nothing else could be issued; and that as a consequence the bond in suit is void.

According to this construction the county court makes the contract, but cannot create or furnish the evidence of it; the evidence can only be furnished by another and a different authority. This indeed would be a strange anomaly, and we do not think this court will so hold except upon the clearest language—certainly not upon mere construction where the language employed is capable of a more consistent and rational interpretation. The absurdity of the construction contended for is all the more glaring when it is remembered that the county warrant is the last step in the series of remedial proceedings whereby the money in the county treasury is reached by the county creditor. It is a proceeding having no connection or relation to the debt or the evidence of it, but is simply a part of the remedial process furnished by law whereby the debt may be satisfied out of the county finances.

We maintain, therefore, that under the laws of Tennessee, Claiborne county, in contracting for the erection of a court house, was not restricted in the mode of making and evidencing the contract; there are no prohibitory words in the statutes either as to the contract or its evidence; the only prohibitory words used relate to the mode of payment out of the county treasury. "No money can be drawn out of the county treasury except upon a county warrant."

A restriction imposed by statute upon the mode of obtaining satisfaction of a debt, certainly cannot be held to destroy the debt itself. The prohibitory words here employed, relate, not to the debt, the contract creating it or to the evidence of it, but to the mode of reaching the only fund out of which the debt must be paid. The county warrant, therefore, so far from being the only evidence the law recognizes of the county's liability for this court house debt, is absolutely no evidence of the contract whatever and was never intended to be, and its non-existence at this stage of the proceedings cannot prejudice our case. Hence, all that part of the argument of counsel for plaintiff in error in relation to the county warrants and their nature, and the adjudications of the Supreme Court of Tennessee in relation thereto, has no application to this case.

The counsel for plaintiff in error, in his printed argument also insists that in point of fact the County Court of Claiborne county never issued or ratified the issuance of the bond sued on, and he criticises the sufficiency of the evidence to establish the fact as found by the jury. To this we reply—That, this is not an open question on this writ of error. This court will not reverse for supposed error of fact in the finding of the jury, unless some error of the court supervenes. Under the issue on the plea of *non est factum* the making or the ratification of the bond was directly involved, and the jury found this issue for the defendant in error. This, we insist, is conclusive of the fact. In this particular, the case at bar differs materially from that of Barnard vs. Hawkins county, quoted in the printed Argument and Brief of plaintiff in error on p. p. 21—23. As appears from the opinion of the court, set out in full,

the county of Hawkins did not in fact issue the bonds in question. The opinion of the court, as furnished by plaintiff in error says that, "No subscription is shown to have been made by any one in behalf of the county (Hawkins). Nor has the County Court in any manner authorized the issuance of these bonds." Certainly this case will not be cited as a parallel case with the one at bar, in which the jury has found as a fact that Claiborne did make or ratify the bond sued on.

We will notice but one other position assumed by counsel for plaintiff in error in his printed argument. He assumes that the proof shows that the county has fully paid and more than paid all that the court house was worth, and that, therefore, the moral equity of the case is with the plaintiff in error. To this we reply that moral equities are not the questions to be considered on this writ of error. The jury found that in point of fact the county owed the debt sued for, and this finding upon the fact involved disposes of all such questions, as this court will not review matters of mere fact involved in the verdict of the jury.

JAMES G. ROSE,
Counsel for Defendant in Error.